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JUN 4 1984
ALEXANDER L. STEVAS
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83-1995

No. ____

IN THE

Supreme Court of the United States

GREENSBORO NEWS COMPANY, *et al.*,

Petitioners,

v.

THOMAS A. FLANNERY, Judge Assigned To United States District Court For The Middle District Of North Carolina, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR CERTIORARI

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STATEMENT OF COMPLIANCE WITH RULE 28.1

The parent company of The Greensboro News Company is Landmark Communications Inc. The parent companies of *The Winston-Salem Journal and Sentinel* are Piedmont Publishing Co., Inc. and Media General, Inc. The parent companies of *The Charlotte News* and *The Charlotte Observer* are Knight Publishing Co. and Knight-Ridder Newspapers, Inc.

QUESTIONS PRESENTED

1. May the First Amendment presumption in favor of public jury *voir dire* be overcome by a trial court's subjective determination that closure is essential to preserve a defendant's Sixth Amendment rights, without specific factual findings capable of review appearing of record?

2. In reviewing a trial court's decision to close courtroom proceedings to the public and press, may an appellate court affirm closure based upon the trial court's discretionary powers without making an independent examination of the record to determine if First Amendment interests have been protected?

LISTING OF PARTIES

The parties to this proceeding in the United States Court of Appeals for the Fourth Circuit were the Greensboro News Company, *The Winston-Salem Journal and Sentinel*, *The Charlotte Observer*, *The Charlotte News*, the News and Observer Publishing Company, the North Carolina Press Association, the Honorable Thomas A Flannery, the United States of America, Virgil L. Griffin, Edward Woodrow Dawson, David Wayne Matthews, Roland Wayne Wood, Jerry Paul Smith, Jack Wilson Fowler, Jr., Roy C. Toney, Coleman B. Pridmore, and Raeford Milano Caudle. After the Fourth Circuit announced the decision for which review is sought, Virgil L. Griffin, Edward Woodrow Dawson, David Wayne Matthews, Roland Wayne Wood, Jerry Paul Smith, Jack Wilson Fowler, Jr., Roy C. Toney, Coleman B. Pridmore and Raeford Milano Caudle were acquitted on 15 April 1984 in the criminal trial out of which this matter arose. Petitioners have therefore notified the Clerk of Court in writing, pursuant to Rule 19.6 of the Supreme Court Rules, of their belief that those parties no longer have an interest in the outcome of this petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ___

IN RE: THE GREENSBORO NEWS COMPANY, THE WINSTON-SALEM JOURNAL AND SENTINEL, THE CHARLOTTE NEWS, THE CHARLOTTE OBSERVER, THE NEWS AND OBSERVER PUBLISHING COMPANY, AND THE NORTH CAROLINA PRESS ASSOCIATION,

Petitioners.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, the Greensboro News Company, *The Winston-Salem Journal and Sentinel*, *The Charlotte News*, *The Charlotte Observer*, the News and Observer Publishing Company, and the North Carolina Press Association, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on 19 January 1984, denying petitioners' request for a writ of mandamus to the United States District Court for the Middle District of North Carolina.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 727 F.2d 1320 (4th Cir. 1984). (A1) The supplemental opinion of the United States Court of Appeals for the Fourth Circuit on the petition for rehearing is also reported at 727 F.2d 1320 (4th Cir. 1984). (A16) The Memorandum Opinion of 12 January 1984 of the District Court for the Middle District of North Carolina has not been reported. (A27)

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on 19 January 1984. A timely petition for rehearing and rehearing en banc was denied on 7 March 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This petition arises out of a criminal trial that resulted from a shooting incident involving members of the Ku Klux Klan, American Nazi Party, and Communist Workers Party in Greensboro, North Carolina, on 3 November 1979. Five Communist Workers Party members or sympathizers died, and several others were wounded. In the aftermath of this tragic occurrence, the State of North Carolina filed criminal charges against six defendants. The entire state court trial, including individual jury *voir dire*, was open to the press and public. After several months of trial, the defendants were acquitted. Subsequently, the United States filed federal criminal charges alleging civil rights violations by nine defendants, five of whom were defendants in the original state court trial. The Honorable Thomas A. Flannery, United States District Judge for the District of Columbia, was designated to hear the case.

A Memorandum and an accompanying Order were filed by the district court on 5 January 1984 with respect to pre-trial publicity matters and extrajudicial statements by witnesses in the case.[1](A36) In the Memorandum, the court stated that it would "conduct extensive individual *voir dire* during which individual potential jurors, *in camera* with defendants but other potential jurors not

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[1] On 13 May 1983, the Honorable Edward J. Devitt, originally assigned to the case, entered an order that restricted out-of-court statements relevant to the case by parties' counsel and witnesses. Judge Flannery modified that order on 6 October 1983, in effect barring extrajudicial statements by lawyers and potential witnesses in the case. The Memorandum and accompanying Order of 5 January 1984 were filed by Judge Flannery in response to a motion filed on behalf of several potential government witnesses seeking clarification of his 6 October order.

present, will be asked probing questions." (A39) The Memorandum also noted that although the press would be tightly controlled during the trial, it would be "free to report this case based on its observations of court proceedings." (A44) The court's Order of 5 January 1984 accompanying the Memorandum did not describe how jury *voir dire* in the case was to be conducted, nor did it place restraints upon press or public access to those *voir dire* proceedings.

The trial began on Monday, 9 January 1984. Jury selection commenced that morning with a short group *voir dire* in open court. Judge Flannery then excused all the potential jurors from the courtroom, called one back into the room, and announced from the bench that individual *voir dire* would be closed to the public and press. Neither the defendants nor the government had filed a motion seeking closure of the individual *voir dire* process, nor did any party file such a motion thereafter. Prior to the closure ruling, the district court did not hold a hearing to afford the public and press an opportunity to state their objections to closure, nor did the district court articulate its reasons supporting closure based upon specific factual findings.

That afternoon, within a few hours after the court ordered the press and public out of the courtroom, petitioners filed a Motion for Hearing in Opposition to Closure of Jury *Voir Dire*. On Wednesday afternoon, 11 January 1984, petitioners were granted an opportunity to appear and make brief oral argument in opposition to the court's closure order. This proceeding was not in the nature of a fact-finding inquiry. The district court issued a Memorandum Order on Thursday morning, 12 January 1984, denying petitioners' motion in order "to protect defendants' Sixth Amendment rights, and solely for that reason." (A35)

On Thursday afternoon, 12 January 1984, petitioners filed with the Court of Appeals for the Fourth Circuit a Petition for Writ of Mandamus and a Motion and Petition for Stay. By order entered later that evening, the Fourth Circuit stayed the district court's orders of 5 January 1984 and 12 January 1984 pending consideration of the petition for writ of mandamus. (A25) In response to the Fourth Circuit's stay order, the district court suspended jury selection entirely pending the Fourth Circuit's ruling on the petition. At the conclusion of oral argument before a panel of the Fourth Circuit on Monday, 16 January 1984, the panel denied the petition, vacated its 12 January stay order and stated that an opinion would be filed promptly. (A23)

On the following morning, Judge Flannery resumed individual *voir dire* in private. That process was completed on Thursday afternoon, 19 January 1984. The remainder of jury selection was completed in open court, and the jury empaneled, on Friday morning, 20 January 1984.[2]

Meanwhile, on Wednesday, 18 January 1984, this Court filed its unanimous opinion in *Press-Enterprise Co. v. Superior Court*, 104 S.Ct. 819 (1984), which dealt with the constitutional limits on closed jury *voir dire*. Then, on 19 January 1984, the same day closed *voir dire* was completed, the Fourth Circuit filed its opinion in this case. Adopting in large part the reasoning of the trial court, the

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[2] On Tuesday morning, 17 January 1984, petitioners had applied to Chief Justice Burger, Circuit Justice for the Fourth Circuit, for an order staying the district court's exclusion of the press and public from jury *voir dire*. The stay application was not acted upon prior to completion of the closed portion of the jury selection process, and the application was therefore withdrawn on 23 January 1984.

Fourth Circuit's opinion neither cited nor discussed this Court's significant opinion of the preceding day.

On Monday, 23 January 1984, petitioners moved for immediate access to the transcript or copies of the tape recordings kept by the court reporter of the closed jury *voir dire* proceeding, at no cost to the press or public. On 24 January 1984, the district court denied this motion, noting that petitioners were "free to contact the court reporter and arrange for obtaining the transcript." (A50) The court reporter informed petitioners that she required a payment of $3,400 before commencing transcription and that it would take her at least three to four weeks to produce the first volume of the anticipated seven volumes. On 31 January 1984, the district court relaxed its prior order *sua sponte* and ordered that a transcript of the closed *voir dire* be included as part of the public docket. (A51)

On 2 February 1984, petitioners filed a petition for rehearing and a motion to supplement the record in support of the petition for rehearing with the Fourth Circuit. In an opinion denying the motion for rehearing, but granting the motion to supplement the record, the Fourth Circuit held:

> [T]he decision in the *Press-Enterprise Co.* case, and the developments, following the seating of the jurors and alternates, respecting publication, or rather delay in the making available, of the *voir dire* proceedings, do not shake our composite conviction as to the correctness of what we held in [the original] opinion.

(A17) The Fourth Circuit continued to support the closure decision of Judge Flannery "for reasons appearing sufficient to him." (A17)

The underlying trial ended 15 April 1984 with the acquittal of all defendants on all charges. Petitioners have

not yet had access to the full transcript of closed jury *voir dire* because the transcript has been completed only for the first four of the seven days of closed jury selection.

REASONS FOR GRANTING THE WRIT

I. The trial court's closure orders, as approved by the Fourth Circuit's decision below, conflict with prior decisions of this Court and with decisions from other circuits by permitting closure of jury *voir dire* without requiring specific factual findings capable of independent appellate review sufficient to overcome the constitutional presumption in favor of public *voir dire*.

The Fourth Circuit's affirmation of the district court's 12 January 1984 closure order is in direct conflict with this Court's recent decisions in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982), and *Press-Enterprise Co.* v. *Superior Court*, 104 S.Ct. 819 (1984).[3] The Fourth Circuit's opinion neither acknowledged the constitutional presumption in favor of public *voir dire* proceedings nor independently reviewed the district court's closure orders in light of any identifiable, objective findings sufficient to sustain closure within the constraints of the First Amendment.[4]

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[3] The completion of the closed *voir dire* proceedings does not make moot the issues raised herein. Because the Fourth Circuit upheld the district court's closure order, it is reasonably foreseeable that other *voir dire* proceedings will be closed by other judges without any greater showing of necessity than is presented on this record. Thus, the underlying dispute is "capable of repetition, yet evading review." *Richmond Newspapers, supra*, 448 U.S. at 563.

[4] The Fourth Circuit's opinion also conflicts with decisions from other circuits establishing that the right of access to jury *voir dire* may be overcome only upon a showing of strict necessity for closure based upon specific findings of record. *See, e.g., United States* v. *Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *In re United States ex rel. Pulitzer Publishing Co.*, 635 F.2d 676 (8th Cir. 1980).

In *Press-Enterprise*, this Court unanimously held that the constitutional presumption of openness extends to jury *voir dire*. In emphasizing the significance of this constitutional presumption, the Chief Justice's opinion warned that:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

104 S.Ct. at 824.

Rather than basing the closure orders upon specific factual findings, the district court's reasoning, approved by the Fourth Circuit, relied solely upon its subjective speculation regarding possible harm to defendants' fair trial rights.[5] Moreover, the district court did not ade-

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[5] Judge Flannery's order of 12 January 1984 denying petitioners' motion in opposition to closure is sprinkled liberally with words and phrases demonstrating that he was engaging in subjective, speculative analysis. For example, he opined that prospective jurors "might" be reluctant to express strong opinions about groups such as the Ku Klux Klan and the Communist Workers Party, and that they "might" fear that their responses would subject them to retribution. (A33) Similarly, the order is replete with instances in which he reached significant conclusions without any factual or evidentiary underpinnings such as his statement that "the potential jurors will be more candid in their responses if they do not have to worry about what the public's opinion of those responses might be." (A34) This Court's observations on the requisite specificity of findings in its unanimous decision in *Waller* v. *Georgia*, 52 U.S.L.W. 4618, 4620 (U.S. May 21, 1984), are directly apposite:

> [T]he State's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes. As a result, the trial court's

quately consider the facts before it regarding available alternatives to closure; nor did it consider the effectiveness of closure. The approach employed by the district court and affirmed by the Fourth Circuit suggests that the constitutional presumption declared in *Press-Enterprise* is easily rebutted, and that it may be overridden by an order that makes no factual findings whatsoever, but which rests instead on the trial judge's conjectural concerns about theoretical problems. Left uncorrected, the rationale of the courts below leads inevitably to a *per se* rule that whenever individual *voir dire* is conducted in a case that has attracted substantial public interest, it must be closed to press and public. Such a result is at complete odds with *Press-Enterprise* and its predecessors.

This case squarely presents the significant issue of whether a trial court must apply objective standards in deciding whether it is constitutionally permissible to question potential jurors outside the presence of the public and press. The district court's subjective approach, approved by the Fourth Circuit, directly undermines *Press-Enterprise* even as that opinion draws its first breaths of life. If a trial court can rebut successfully the constitutional presumption of public *voir dire* by subjective speculation in the absence of any compelling, factual findings of record, this Court's decision in *Press-Enterprise* will be reduced to a unanimous statement of constitutional principle with no practical impact.

The test for closure of *voir dire* set forth in *Press-Enterprise* is essentially the same as the test for closure of any aspect of a criminal trial. In *Richmond Newspa-*

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findings were broad and general, and did not purport to justify closure of the entire hearing.

The clear import of this analysis is that general, subjective conclusions in the absence of factual findings do not suffice as a justification for closure.

pers, the Court held that the press and public possess a guaranteed right under the First and Fourteenth Amendments to attend criminal trials which, although not absolute, could not be abandoned without an "overriding interest articulated in findings." 448 U.S. at 581. Two years later in *Globe Newspaper*, this Court held that a mandatory closure statute for cases involving sex offenses against minors violated the First Amendment right of access to criminal trials recognized in *Richmond Newspapers*. In *Press-Enterprise*, this Court extended to *voir dire* the constitutional right of openness and standards for closure applicable to other stages of the criminal trial. This Court's recent decision in *Waller* v. *Georgia*, 52 U.S.L.W. 4618 (U.S. May 21, 1984), establishes that this same test also applies to pre-trial suppression hearings.[6] The Fourth Circuit's holding implies that a subjective standard may suffice to close not only jury selection, but other parts of criminal trials as well. So lenient a test for turning constitutional rights aside demands the attention of this Court, and underscores the need for the Court to delineate clearly the objective criteria and procedures required to rebut the constitutional presumption of openness. Petitioners respectfully submit that under any objective standard this Court may adopt, closure was constitutionally impermissible in the present case.

When the Court's recent decisions concerning access to criminal court proceedings are read together, they establish a constitutional right of access, which is grounded on

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[6] In *Waller*, this Court held that "under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors." 52 U.S.L.W. at 4620. Although the holding in *Waller* was founded upon the Sixth Amendment, this Court acknowledged the "relevant precedents" established by recent cases finding that the "press and public have a qualified First Amendment right to attend a criminal trial." *Id.* at 4619.

a compelling public policy that acknowledges the "community therapeutic value" of public court proceedings in encouraging public confidence in the criminal justice system. *Richmond Newspapers, supra*, 448 U.S. at 570-72. Open trials, particularly in criminal actions attracting significant public attention, promote public confidence in our judicial system. As the Court observed in *Richmond Newspapers*: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572.

The First Amendment right of access to courtroom proceedings is not absolute. It must be balanced against a defendant's Sixth Amendment guarantee of a fair trial. The Court in *Richmond Newspapers* held that, absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. *Id.* at 581. In *Globe Newspaper*, this Court concluded that when the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. 457 U.S. at 606-07. This Court in *Press-Enterprise* held that the constitutional presumption of openness may be overcome only by an overriding interest based upon findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. This Court noted that the findings must be specific enough to allow a reviewing court to determine whether the closure order was properly entered. 104 S.Ct. at 824.

In this case, the Fourth Circuit adopted the district court's use of the three-part test articulated in Justice Blackmun's dissent in *Gannett Co.* v. *DePasquale*, 443

U.S. 368 (1979). (A11-12) Under that test, a court must find the following to justify a closure order:

1. A substantial probability that irreparable damage to defendant's fair trial right will result in conducting a proceeding in public;
2. A substantial probability that alternatives to closure will not protect adequately defendant's right to a fair trial; and
3. A substantial probability that closure will be effective in protecting against the perceived harm.

The Fourth Circuit erred in affirming the district court's determination that the three-part test had been met, because the district court did not make factual findings to support that determination.

A. Irreparable damage to defendants' fair trial rights.

The district court concluded that there was a substantial probability that defendants' fair trial rights would be harmed unless each juror was questioned individually in private. The district court's justification for this conclusion was the high degree of public interest and the quantity of publicity that the trial had generated.[7] (A31) The district court expressed the belief that "human nature" required individual *voir dire* in order to elicit candid juror responses because:

1. A juror who had been influenced by news accounts might be reluctant to admit such influence before his or her fellow jurors; and

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[7] It is noteworthy that the district court voiced no complaints about the quality of the media coverage. To the contrary, the district court stated that it had been "extremely impressed with the even-handed nature of the media coverage of this case and the surrounding events." (A31)

2. A juror who explained in front of other jurors why he or she had been so influenced by news accounts might taint other jurors with the substance of the news account.

(A31-32)

Once the district court had determined that individual *voir dire* was appropriate, it decided that the presence of the press and public could thwart the purpose of individual *voir dire* for two reasons:

1. Since all potential jurors would not be questioned the first day and would have access to news accounts about jury selection, potential jurors might sense that a stigma attached to jurors who admitted they had been influenced by prior news accounts and therefore be reluctant to admit such influences on themselves.

2. Potential jurors might read news accounts of jurors who revealed the substance of prior prejudicial news accounts about the case and thereby become tainted.

(A31-32)

Finally, the district court stated that both individual *voir dire* and exclusion of the public and press from the *voir dire* were necessary because:

1. The case involved organizations—the Ku Klux Klan, the American Nazi Party and the Communist Workers Party — who "occasionally evoke strong opinions in people;" and

2. "It may be that some people believe that these organizations are prone to violence. If some potential jurors believe these propositions they might be reluctant to express any strong opinions about these organizations, knowing that

> their responses would be reported by the media. These potential jurors might fear that honest responses would subject them to retribution."

(A32-33)

Based on its concern that potential jurors would not give honest answers under oath, the district court found a "substantial probability" that irreparable damage to defendants' fair trial rights would result from conducting the *voir dire* proceeding in public. This conclusion, however, was not based upon any factual findings in the order.[8]

The district court's apprehensions about juror candor were speculative. The court worried that "human nature" would make potential jurors reluctant to admit that they had been influenced by news accounts if they had read or heard press accounts of other jurors who had been chal-

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[8] There were no findings in the record providing any factual justification for closure because neither the defendants nor the government had ever moved to exclude the press and public from jury *voir dire* and a hearing was therefore never held prior to the decision. The district court neither sought nor was it presented with any evidence in support of closure by the parties. The only evidence of record concerning the closure decision was presented by petitioners, and addressed the complete openness of the prior state court trial.

The absence of any notice to the press and public about the district court's decision to close jury *voir dire* raises the important issue of what notice is required from a trial court contemplating closure of a criminal proceeding to the press and public *prior* to making the closure decision. Here, no opportunity to be heard with respect to the court's closure ruling was afforded petitioners until after the court's decision was made and over two days of jury *voir dire* were already completed in private. Petitioners were not given an opportunity for a hearing on the court's closure decision at a time when it was still meaningful.

lenged because of similar admissions.[9] The unproven premise underlying the district court's reasoning that jurors will not respond truthfully to questions posed during *voir dire* is alarming. There are no findings of record to support the opinion that jurors would be any less candid in responding to questions under oath during *voir dire* if the press or public were present.[10] This premise by the district court is not only unsupported in fact, but reflects a skeptical attitude about the time-honored and constitutionally-endorsed system of trial by jury.

The district court's suggestion that the jurors might learn of the substance of prior prejudicial news accounts by reading news accounts of the jury selection is conjectural at best. As noted above, the court made no finding that there existed any unfair, sensational or prejudicial news accounts of the case. By their very nature, highly publicized criminal trials focus public attention most keenly upon the workings of our criminal justice system. Certainly this case, in which self-professed

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[9] This Court's unanimous decision in *Waller* endorses a less cynical view of "human nature." In *Waller*, this Court quoted with approval from Justice Harlan's concurring opinion in *Estes* v. *Texas*, 381 U.S. 532, 588 (1965), which observed: "Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." 52 U.S.L.W. at 4619 n. 4.

[10] In fact, another benefit of permitting public access to *voir dire* in publicized cases is that openness has a purging effect on juror responses. Statements of potential jurors may be disseminated in the news media or observed first-hand by members of the public who may have personal knowledge that information provided by a prospective juror may not be entirely accurate. *See, e.g., Commercial Printing Co.* v. *Lee*, 262 Ark. 87, 553 S.W.2d 270, 273 (1977). A public trial also encourages witnesses to come forward and testify and discourages inaccurate statements. *See, e.g., Waller, supra*, 52 U.S.L.W. at 5620.

Klansmen and Nazis were acquitted for the second time by an all-white jury, has severely tested public confidence in the administration of criminal justice. It is indeed ironic that in such an important case the trial judge employed, and the Fourth Circuit approved, a virtual *per se* rule that in view of the widespread publicity the jury *voir dire* could be conducted in secret without reference to any factual findings articulated in the record.

The district court also suggested that jurors might hold strong opinions about some of the organizations involved in the case, and that some jurors might fear retribution by those organizations if they expressed such opinions. (A33) This rationale, however well-intentioned, is flawed and not based on fact. There was simply no evidence in the record of either the depth of feeling on the part of potential jurors or of threatened retribution against anyone involved in the case. Moreover, even if the court's concern about fear of retribution was well taken, it is difficult to conceive how the presence of public and press could have exacerbated the perceived intimidation created by the presence of the defendants in the courtroom. Indeed, public and press scrutiny could well serve to lessen possible intimidation of jurors.

In sum, the district court's finding that there was a substantial probability of irreparable harm to defendants' fair trial rights if *voir dire* were conducted in public was based entirely upon its speculation regarding such generalized matters as "human nature," possible (but unspecified) fears about intimidation and retribution, and unsupported skepticism about juror candor. The court ignored the most significant fact before it in considering whether public *voir dire* would endanger defendants' right to a fair trial — the fact that the entire prior state court trial, including *voir dire*, was conducted in open court and

resulted in the acquittal of all defendants. This fact creates a *factual* presumption that openness would not prejudice the defendants, buttressing the *constitutional* presumption articulated by this Court. The trial court made no findings sufficient to rebut either presumption.

Speculation, informed or uninformed, is subjective. To permit closure to rest on conjecture and speculation is to emasculate *Press-Enterprise* and reverse the constitutional presumption created for the openness of jury *voir dire*. Unless trial courts are required to demonstrate the existence of a *real* risk of prejudice to fair trial rights — unless they are required to make specific findings, capable of objective review — closure will become easy and habitual. All that will be necessary will be for a trial judge to express the *belief* that those called to perform their duty as possible jurors will be tainted, fearful of retribution and less than truthful, and that the court will be unable, except in secret, to select a jury that can fairly decide questions of a defendant's guilt or innocence. The clear lesson of *Press-Enterprise* is the precise opposite; closure should not be frequent and easy, but rare and presumptively difficult. In every case, closure should be a last resort, bottomed solidly on palpable findings of compelling need.

B. No adequate alternatives to closure.

The district court also concluded that the second prong of Justice Blackmun's three-part test had been met: that a substantial probability existed that alternatives to closure would not protect adequately defendants' right to a fair trial.[11] That conclusion, approved by the Fourth Cir-

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[11] The district court and the Fourth Circuit emphasized the prompt availability of a full transcript of the *voir dire* proceeding as a satisfactory alternative to public access to the actual jury selection.

cuit, was based on inadequate consideration of less restrictive alternatives.

The district court stated that alternatives to closure were impractical, if not impossible. It noted (1) that sequestration of the approximately 750 potential jurors was "not feasible" and (2) that a limitation on what the press would be allowed to report would not "prevent the possibility of exponential multiplication of prejudicial publicity." (A34) The district court thus concluded that "no alternative to closure would adequately protect defendants' right to a fair trial." (A34)

The district court failed to consider at least three viable alternatives to closure. First, the district court's notices summoning the original 1,500 potential jurors could have instructed them emphatically not to read or observe news accounts of the case. When a potential juror was summoned to the courtroom, the court then could have asked the juror if he or she had complied with that specific instruction. Assuming the truthfulness of jurors under oath, the court's fear of the "multiplication of prejudicial publicity" could have been calmed.

Second, if a juror stated during *voir dire* that he or she had been influenced by a news account and had prejudged the case on that basis, a less restrictive alternative to closure would have been simply to remove that potential juror for cause without delving into the substance of the news accounts that had caused the prejudgment, thus eliminating the possibility that the juror's explanation would taint the other jurors. Alternatively, if absolutely essential, the juror could discuss the substance of the

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The assumption of a complete transcript being made available promptly was illusory, as its continued unavailability has established.

account at a side bar conference, while answering other questions publicly.[12]

Third, if the district court had concerns about the possibility that jurors might fear retribution, it could have maintained the anonymity of the jurors by referring to them by number or by code name instead of by actual name. *See, e.g, United States* v. *Layton*, 519 F.Supp. 959 (N.D. Cal. 1981).

Any suggestion that eventual access to the transcript of *voir dire* several months later is an acceptable alternative directly conflicts with the reasoning of *Press-Enterprise*. By necessity, news must be current, and a transcript cannot fulfill that function; nor does it reveal the true atmosphere and flavor of the proceeding.[13]

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[12] Such a procedure was suggested by this Court in *Press-Enterprise* as an alternative method to deal with questions that were personally embarrassing. 104 S.Ct. at 825.

[13] The impairment of First Amendment values resulting from closure cannot be alleviated by the release of a transcript. A transcript can never be a substitute for the multi-dimensional perceptions of the human presence. *See Richmond Newspapers*, *supra*, 448 U.S. at 597 n. 22; *Gannett Co.*, *supra*, 443 U.S. at 442 n. 17 (Blackmun, J., dissenting). Even the most accurate transcript of a *voir dire* necessarily leaves undisclosed such details as a prospective juror's appearance, hesitancy in responding, tone of voice, gestures, mannerisms, grimaces, accent, and hearing. One of the most prominent and controversial aspects of this case is the existence of racial overtones and undercurrents. The transcript, as released to date, fails to disclose clearly in most cases the races of the various prospective jurors, and the press and public will be hard pressed to learn precisely how an all-white jury came to be seated for the trial.

Moreover, transcripts are simply not timely. *See, e.g., Gannett Co., supra*, 443 U.S. at 442 n. 17 (Blackmun, J., dissenting); *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 561 (1976).

C. Closure's protection against the perceived harm.

The district court's conclusion, approved by the Fourth Circuit, that there was "no argument that the closure order will fail to protect against the perceived harm" is also flawed. As shown above, the district court's concern that jurors might fear retribution was not solved by the closure order. The nine defendants in the case were all present during the jury selection and the potential jurors were identified by name. Moreover, those jurors' names will become public as the transcript is completed, and anyone desiring retribution will have access to their names.

In summary, the district court's underlying rationale for its closure order did not meet the constitutional standards established in *Press-Enterprise* and its predecessors for exclusion of press and public from *voir dire* proceedings. The district court's reliance on subjective speculation to overcome the constitutional presumption of openness demonstrates the need for establishing the requirement that findings of fact with an evidentiary basis capable of appellate review must be made before a closure order may be entered.

II. The decision of the Fourth Circuit below conflicts with prior decisions of this Court and with decisions from other circuits because the court of appeals did not make an independent examination of the record to decide whether closure of the jury *voir dire* was constitutional but instead deferred to the discretion of the trial court.

In denying petitioners' request for a writ of mandamus, the Fourth Circuit held that the trial court's findings and conclusions that closure was necessary to avoid the risk of substantial diminution of the defendants' Sixth Amendment rights were "neither clearly erroneous nor an abuse of discretion." (A6) Further, in its supplemental opinion

denying petitioners' petition for rehearing, the Fourth Circuit noted that the trial court had closed the *voir dire* proceedings "for reasons appearing sufficient to him." (A17)

The limited appellate review engaged in by the Fourth Circuit was error.[14] Because the matter in issue involved the First Amendment, federal constitutional law required the Fourth Circuit to conduct an independent examination of the entire record.[15] This requirement of independent review of First Amendment issues was initially established in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-86 (1964), and was firmly reiterated recently in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 52 U.S.L.W. 4513 (U.S. April 30, 1984). As this Court stated in *Bose*, a First Amendment defamation case, the historical requirement of independent review

> reflects a deeply held conviction that judges - and particularly members of this Court - must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. . . . Judges, as expositors of the Constitution, must independently decide whether the evidence in the

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[14] The Fourth Circuit stated that it could not "improve on what [Judge Flannery] has written" in the 12 January 1984 Memorandum Order. (A11) The Fourth Circuit therefore simply excerpted the principal portion of the order as a primary source of justification for affirming the decision to close jury *voir dire* rather than engaging in an independent examination of the record for any findings supporting the conclusory beliefs expressed in the trial court's order.

[15] The Fourth Circuit's opinion conflicts with decisions from other circuits in failing to require findings by the district court capable of independent appellate review demonstrating that open proceedings would in fact threaten defendants' fair trial rights. *See, e.g., United States* v. *Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *United States* v. *Criden*, 675 F.2d 550 (3d Cir. 1982); *In re United States ex rel. Pulitzer Publishing Co.*, 635 F.2d 676 (8th Cir. 1980).

> record is sufficient to cross the constitutional threshold [in question].

Id. at 4520.

In a First Amendment right of access case involving closure of a portion of a criminal trial, the appellate court must review the record to make sure that the constitutional presumption of openness has been properly applied and that the factual showing required to rebut the presumption has been made. This is the policy underlying the requirement of independent appellate review of constitutional questions.

To allow meaningful appellate review, the trial court had to make findings sufficient to permit the Fourth Circuit to determine the constitutional question of access on the basis of a cold record. This level of review requires the trial court to make individualized factual findings that are case-specific. *See, e.g., Globe Newspaper, supra,* 457 U.S. at 608 n. 20; *Richmond Newspapers, supra,* 448 U.S. at 581. The record before the Fourth Circuit, however, contained only the trial court's subjective ruminations and suspicions of possible harm resulting from open *voir dire* proceedings, with no specific factual basis. The potential dangers theorized by the trial court were equally applicable to many kinds of criminal trials of public interest; they were not unique to the Klan-Nazi trial. Meaningful appellate review was therefore not possible, because the findings were insufficient as a matter of law to allow independent scrutiny by the Fourth Circuit.

Had the Fourth Circuit engaged in the proper level of review required by the decisions of the Court in other First Amendment cases, it would have discovered that the trial court did not make adequate findings of fact with an evidentiary basis sufficient to overcome the constitutional presumption of openness established in *Press-*

Enterprise and its predecessors. The Fourth Circuit's failure to require or examine factual findings in this case graphically illustrates the necessity for extension of the principle of independent appellate review to First Amendment right of access cases.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1039

In re: The Greensboro News Company, The Winston-Salem Journal and Sentinel, The Charlotte News, The Charlotte Observer, and The News and Observer Publishing Company,

Petitioners.

United States of America

v.

Virgil L. Griffin, Edward Woodrow Dawson, David Wayne Matthews, Roland Wayne Wood, Jerry Paul Smith, Jack Wilson Fowler, Jr., Roy C. Toney, Coleman B. Pridmore, and Raeford [sic] Miland Caudel [sic].

On Petition for Writ of Mandamus to the United States District Court for the Middle District of North Carolina.

Argued January 16, 1984 Decided January 19, 1984

Before PHILLIPS, CHAPMAN, and MURNAGHAN, Circuit Judges

MURNAGHAN, Circuit Judge:

Several newspapers, feeling themselves aggrieved by action of the district judge in *United States of America* v. *Virgil Griffin*, in the United States District Court for the Middle District of North Carolina, Criminal No. 83-5301 G and eight connected cases, 83-5302 G through 09 G, have petitioned, in Fourth Circuit Case No. 84-1039, for issuance of a writ of mandamus to annul an order dated January 4, 1984, filed with the district court clerk on January 5, 1984 (hereafter the January 5, 1984 order). The order, by reference to an accompanying memorandum, provided for the conduct of individual *voir dire* "*in camera* with defendants present but other potential jurors not present." The *in camera* portion of the order manifestly closed the individual *voir dire* proceedings to the public, including members of the news media.

Alternatively, the petitioners have attempted to appeal in the nine criminal cases, Criminal Nos. 83-5301 G through 09 G. In light of the fact that the appeal has been taken only to guard against a jurisdictional challenge to proceeding by way of mandamus, we do not decide whether an appeal has procedurally been perfected, and give it no further attention inasmuch as we are satisfied that, as a route for reviewing the questions presented, the petition for writ of mandamus was proper. *Central South Carolina Chapter of Professional Journalists* v. *United States District Court for the District of South Carolina*, 551 F.2d 559 (4th Cir. 1977); 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

The portion of the district judge's order of January 5, 1984 closing the *voir dire* to other potential jurors, has not been questioned by any party. That portion required that *voir dire* held for the purpose of ascertaining whether individual jurors should be dismissed for cause should

proceed on the basis of presence, insofar as the potential jurors were concerned, being restricted solely to the potential juror whose status was, at the time, being questioned.[1] The reasons underlying that order included concern that the presence of other potential jurors might inhibit the one whose qualification to serve as a witness was being ascertained from being as frank and forthcoming as would otherwise be the case if he or she alone, among potential jurors, were present.

The consolidated criminal case involved charges under 18 U.S.C. § 245 that the defendants, in violation of federally protected activities, had violated or conspired to violate rights of individuals shot down in a wild fracas on November 3, 1979 involving Ku Klux Klan and National Socialist Party of America adherents on the one hand and participants in an anti-Klan parade and other persons on the other. In 1980 a number of the defendants here had been acquitted in state court of murder charges emanating from the most regrettable event. Publicity in North Carolina has been widespread, both with respect to the

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[1] It is not completely accurate to describe the order as wholly *sua sponte* on the part of the judge since it was the outgrowth of consideration and denial of a motion made by several potential government witnesses seeking release from a "gag" order entered on October 13, 1983. The October 13, 1983 order had banned extra-judicial statements by counsel and witnesses. The district judge found that the release from the "gag" order was sought in order to publicize the stories of the government witnesses in a fashion highly prejudicial to the defendants. Intense local and national publicity could be expected to attend the prejudicial statements. Having had, by the motion to release witnesses from the "gag" rule, his attention focussed on the subject of assured fairness in the manner in which the case was handled, the district judge rather understandably took up on his own a matter of relevant and related interest.

state charges and trial in North Carolina and in the case of the currently pending federal charges.

The portion of the order, entered January 5, 1984, calling for *in camera* conduct of the *voir dire* is the focal point of the petitioners' complaint. However, closures to a) potential jurors and b) the public generally, including the news media, are not unrelated. The second manifestly will significantly aid in preventing a breakdown in accomplishment of the objectives of the first. The district judge, in order to minimize any adverse consequences of the *in camera* requirement, further spelled out that the *voir dire* proceedings should be recorded, transcribed, and made fully available to the public, the news media included, upon transcription.[2]

In the afternoon on January 9, 1984, the petitioners moved for relief from the *in camera* exclusionary order,[3] whereupon the district judge scheduled a hearing to take place on January 11, 1984 to afford them an opportunity to state their objections. The district judge entered on January 12, 1984 an order denying the requested relief.

By the time the petitioners' January 9, 1984 motion came to the attention of the district judge, two days of *in*

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[2] While that theoretically leaves some scope for disagreement as to when the transcription would first be made available, at oral argument before us on January 16, 1984, counsel both for the United States, as prosecutor and for the defendants insisted that they had no objection to release of the transcription as soon as the jury and alternates had been chosen and seated in the jury box. We should view with concern any substantial delay in release of the information beyond that date, barring a development at present not foreseeable by us.

[3] On January 10, 1984 a supporting memorandum was filed by the petitioners.

camera voir dire had taken place; a third occurred on January 12, 1984. The district judge, having commenced with *in camera voir dire*, had identified by January 12, 1984 48 prospective jurors not disqualified for cause.[4] In the same time frame 37 had been excused for cause.

Both the prosecutors and counsel for all the defendants have favored the entry of the order the propriety of which is contested in the instant proceeding. Both have expressed themselves as satisfied that progress to date in the conduct of the *voir dire* has been unexceptional and fair to them. At least, any objections they might wish to make are unassociated with the order excluding the public, the news media included, from attendance at *voir dire*.

On Thursday, January 12, 1984, a panel of the Fourth Circuit Court of Appeals, appreciating the serious and imperative nature of the questions presented, entered a stay to allow resolution of the question before completion of the *voir dire* ended any chance for petitioners to attend even a portion thereof.

On Monday, January 16, 1984, having received written presentations from the petitioners, from the United States as prosecutor in the nine criminal cases and from the criminal defendants, we heard oral argument. On the same day, following argument, we entered an order denying the petition for a writ of mandamus, and, if appeal properly lay from the district court's closure order,

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[4] He had previously determined that a total of 70 should be identified who would so qualify. Becuse of the extraordinary nature of the case, a panel of 1500 prospective jurors had been called. Even after release of less than one-half of that number for reasons of hardship, 750 or more remained for submission to *voir dire* if necessary.

affirming that order. We promised to supply, as quickly as may be, an opinion setting forth the reasons for the decisions we took. What follows is our attempt to redeem that promise.

We start with the premise that claims for First Amendment protection receive especially sympathetic attention and that curtailment of the rights of free access to information is the narrow exception to a sweeping general rule. At the same time, absolutism and rigid dogmatic application of concepts, regardless of consequence, are antagonistic to our judicial system. After balancing all the applicable considerations, of principle and of pertinent fact, we are persuaded that, with an unavoidable minimum of interference with freedom of access to information, the district judge has avoided a very real risk of substantial diminution in the rights of the defendants to a trial by an impartial jury guaranteed by the Sixth Amendment to the Federal Constitution. Certainly, on such a sensitive matter, his determination that a risk to that precious right exists is significant and is neither clearly erroneous nor an abuse of discretion.

It must be borne in mind, at the outset, that the rights of the news media, as freely acknowledged at oral argument, are co-extensive with and do not exceed those rights of members of the public in general. Not infrequently, the purveyors of news stand in as surrogates for the other entities and persons comprising the public, but the scope of their rights is defined by the scope of the rights adhering to those for whom they purport to act. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 573 (1980); *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 609 (1978).

Then it too must be acknowledged that, the district judge having identified and established the existence of a

tension between First Amendment concerns of the petitioners and the Sixth Amendment fair trial guarantees of the defendants, he had to investigate whether a less disruptive alternative existed to achieve the protection of Sixth Amendment rights here endangered. The petitioners have, however, narrowed the scope of that inquiry for they have insisted on but one solution, putting forth no alternative for consideration.[5] They seek to insist upon identifying free and immediate access to the *voir dire* as the absolute minimum consonant with their perceptions

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[5] In contrast, the district judge, in *United States v. Layton*, 519 F. Supp. 959 (N.D. Calif. 1981) called for the suppression of public identification of prospective jurors' names, in part through use of numbers to refer to them. Whatever view one may take of the effectiveness of a numbers game, as judged against the ingenuity of reporters for other news entities not parties to the suit, and so free from the threat of a contempt citation, to pierce the attempted veil, the important consideration differentiating the *Layton* case is the concern of the district judge in *Layton* over his apparent assumption that the occurrences at *voir dire* would, if the request *of the defendants* for closure were granted, be lost to the public entirely. Here, however, the idea of closure originated with the judge, himself, and he provided an important differentiating element by calling for transcription and release of the full *voir dire* proceedings, once the purposes of closure had been served. *Cf. Sacramento Bee v. United States District Court for the Eastern District of California, Northern Division*, 656 F.2d 477, 482 (9th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982).

Much more apt as authority, it seems to us, is *United States v. Hearst*, 412 F. Supp. 873 (N.D. Calif. 1976). Under facts essentially indistinguishable from those of the instant nine consolidated cases, the court disagreed that "less drastic measures than a total ban against public attendance . . . might have been taken to achieve the same results." The court went on to canvass less drastic alternatives and found them unsatisfactory. A full and complete record was to be available for release to press and public after selection and sequestration of the jury.

of what their First Amendment rights are. That would, however, fail to alleviate several serious problems. Free access, of course, leads inevitably to widespread dissemination. Despite the best and most well intentioned cooperation of court, parties and prospective jurors, and the strongest exhortations from the district judge to abstain from perusal of newspapers, magazines and the like, or viewing or hearing television or radio broadcasts, when dealing in numbers in the neighborhood of 750 prospective jurors, the likelihood of complete success is small. Just as obviously, segregation of 750 prospective jurors at the outset of the *voir dire* process, while theoretically, perhaps, possible, would impose an intolerable strain. Not only would location of physical facilities be severely taxing, but, furthermore, demands to monitor and supervise them would create debilitating, indeed exhausting, burdens in terms of operation of the court system as a whole.[6]

It should be remembered that the closure order was subordinate to, and only in implementation of the order excluding all other potential jurors from the *voir dire* examination of any one of them. Such practice is not unusual, nor viewed with suspicion. It is recommended by the Judicial Conference of the United States. *See Revised Free Press-Fair Trial Guidelines of the Judicial Conference of the United States*, 87 F.R.D. 525, 532-33 (1980). It is endorsed by the American Bar Association. *ABA Standards for Criminal Justice, Fair Trial and Free Press*, Standard 8-3.5 "Selecting the Jury." Concern does not appear to have surfaced for perceived First Amendment rights of the excluded potential jurors, who also may lay claim to membersip rights of the public. The

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[6] *Cf. United States v. Hearst*, *supra*, at 876.

order under attack has the same ends, and indeed, exists only to insure the same result, as another order generally accepted as appropriate, and, indeed, in some cases, altogether necessary.

Hence, the insistence on all-or-nothing relief professed by the petitioners does not commend itself to us as a reason to choose "all". Its sole basis is the perceived diminution of the worth of news, if not stale, at least of diminished freshness. That, it is thought, may, in some not quantified way, reduce the beneficial effect for the body politic of steady, immediate promulgation of the public business carried on in court.[7]

Yet, as customarily in the law, such a general fear must be measured by the extent of the risk. In light of the success at the district court level in already identifying in three days, through *voir dire*, almost 70% of the potential jurors presumptively not subject to striking for cause, it is to be expected that in another week, or less, the order of which complaint has been made, and its delaying effect on the promulgation of news, should have expired.

It should be noted, that the petitioners evinced no interest in one suggested solution designed to lessen any loss in freshness or timbre of the testimony at *voir dire*. They were asked at the oral argument whether, to avoid the possibility of any loss through transcription and through having to rely on cold mechanical reproduction,

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[7] The purely commercial side, the greater economic value of "hot" news as compared to news delayed, but fully disclosed and equally accessible to all when released, does not, in our judgment, amount to a substantial constitutional consideration, at least when measured against the not inconsiderable Sixth Amendment concerns of the defendants.

lacking in intonation, for the words of court, potential jurors, and possibly of counsel for the prosecution and counsel for the defendants, they had sought or would seek an alternative order which would permit newsmen to attend *voir dire* sessions. The suggested order would require the newspapermen to be segregated, and not allowed to communicate with their employers or others until the moment for release of tapes of the proceedings was at hand. Their response was in the negative. Their lack of interest was palpable.

On balance, we are satisfied that the substantive contents of the statements made at *voir dire* will be in all essential respects as newsworthy if disseminated to the public on Monday, January 23, 1984 as on Monday, January 16, 1984. The likelihood of candor and consequent enhanced truth will be increased. The threat of theoretical diminution in the impact of a delayed description of the performance of actors in a fleeting scene in the court drama preliminary to the main stage setting, fades in importance when contrasted with the highly likely slackening in the assurance of the best possible jury if unrestricted access by the petitioners to the *voir dire* before it is completed and the jury and alternates seated is permitted. *Voir dire,* as contrasted to the trial, is of limited scope, finite and brief. It must be kept in the forefront of our minds that two weeks of delay, but none whatsoever in denial of full access, are what are involved.

We commend Judge Thomas A. Flannery for a sensitive and sensible solution to an almost intractable problem, given the proper preference of First Amendment rights in almost every situation. "Almost" is the key word, however, and Judge Flannery has properly identified one of the few acceptable exceptions to a virtually unanimous rule. Indeed, in the final analysis, Judge

Flannery in his Memorandum Order of January 12, 1984 denying the substantive relief which had been requested by petitioners succinctly but thoroughly outlined the applicable legal authorities, choosing, in any case of doubt, the route most favorable to the petitioners and made the requisite findings to support his January 5, 1984 order. We cannot improve on what he has written, and so simply excerpt the principal portion of his Memorandum Order:

> Neither of the opinions rejecting closure orders control the instant case. Unlike the Court in *Nebraska Press*,[8] this Court has not banned the press from reporting any aspect of the case. Indeed, this very point was emphasized in this Court's Order of January 5, 1984. Order at 10. Similarly, *Richmond Newspapers*[9] is not directly applicable to the case at bar. In *Richmond Newspapers*, the Court dealt with the trial, as opposed to the *voir dire* proceedings. Even if *voir dire* proceedings are considered part of the trial, *see United States* v. *Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982), the facts in the present case meet the criteria for a closure order established by *Richmond Newspapers*.
>
> Before turning to the factors of this case, this Court must pause to consider the standard for a closure order. The Supreme Court has not established a practical standard in this area. As noted above, *Gannett*[10] requires a somewhat nebulous balancing test, and *Richmond Newspapers* required an "overriding interest" to exclude the public. The most stringent test was suggested by Justice Blackmun in dissent in *Gannett*. 443 U.S. at 440-42. . . . Under

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[8] *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

[9] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

[10] *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

that test a court must find the following to justify a closure order:

1. A substantial probability that irreparable damage to defendant's fair-trial right will result from conducting the proceeding in public;
2. A substantial probability that alternatives to closure will not protect adequately his right to fair trial;
3. A substantial probability that closure will be effective in protecting against the perceived harm.

Id. This Court is far from convinced that this stringent test is required to justify a closure order applied to jury selection proceedings.[3] [[3] *Gannett* would seem to be most closely analogous to the case at bar. It involved pretrial proceedings, and it appears to this Court that jury selection would fall within that category. *Contra Brooklier, supra*, 685 F.2d at 1167. It is this Court's view that a trial begins once jeopardy attaches, *i.e.*, when a jury is sworn. It is unclear, however, to what extent *Gannett* survives *Richmond Newspapers*. This Court is reluctant, therefore, to place its reliance on the holding of *Gannett*.] It is aware, however, that the safest course is to apply the strictest test adopted by the Courts that have considered the matter. *See Brooklier, supra*, 685 F.2d at 1167. The test enunciated by Justice Blackmun, therefore, will be applied to the present case.

This Court need not rehash the intense and continuing public interest in this trial. The magnitide of publicity that this case has generated may be unprecedented in this area. A careful and exhausting *voir dire* process is crucial to ensure that these defendants will be tried by an impartial jury which will render its verdict on the basis of evidence adduced at trial rather than information from the newspapers or television.[4] [[4] This Court is not in any way impugning

the integrity or fairness of the news media. Quite to the contrary, this Court has been extremely impressed with the even-handed nature of the media coverage of this case and the surrounding events. A television or newspaper report, however, is not, nor should it be, edited in accordance with the Federal Rules of Evidence. Even an impartial news report, therefore, may contain information that would be deemed "prejudicial" in the context of a courtroom. It is crucial that this Court have an opportunity to effectively determine whether the potential jurors are irreparably tainted by the publicity they have been exposed to, or whether they can decide the case solely on the basis of the evidence they hear at trial. Any action that this Court takes to reduce publicity related to that case is taken to further this goal.] In order to accomplish this task the Court felt that it was necessary to question individual jurors outside of the presence of other potential jurors. This procedure has a long history of approval by the Courts. *See e.g.*, *United States* v. *Bryant*, 471 F.2d 1040 (D.C.Cir. 1972); *United States* v. *Colabella*, 448 F.2d 1299 (2d Cir. 1971). This rationale for the procedure was vividly described by the District of Columbia Circuit Court, when it stated that:

> It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors that he would be influenced in his verdict by a newspaper story of the trial. Not only so, but had one or more of them said they would be so influenced, and especially if they had explained why, the damage to the defendant would have been spread to the listening other jurors.

Coppedge v. *United States*, 272 F.2d 504, 508 (1959). That same damage would occur if the press was allowed to observe and report the questions and responses. Potential jurors reading these reports would then be irreparably tainted. Responses would be less trustworthy if jurors felt that the public would look askance at someone too easily influenced

by the press. No amount of questioning could remedy this taint. Furthermore, the problem of prejudicial publicity would be multiplied by every response of a potential juror reported in the press. The nature of this case adds an additional problem to the publication of potential jurors' names, county of residence, and responses to questions. This case involves various organizations that occasionally evoke strong opinions in people. It may be that some people believe that these organizations are prone to violence. If some potential jurors believed these propositions they might be reluctant to express any strong opinions about these organizations, knowing that their responses would be reported by the media. These potential jurors might fear that honest responses would subject them to retribution. Once again, no amount of questioning could remedy responses motivated by fear.

This Court is convinced, therefore, that the first prong of this test is satisfied. The second prong of this test requires the Court to evaluate the effectiveness of alternatives to the closure order that are less restrictive. At this point it should be noted that the Court has attempted to conduct these proceedings as openly as possible, and still protect the impartiality and integrity of the jury. The group *voir dire* as well as the statement of the case is open to the press and public. Furthermore, the press and public will be allowed to observe and report the actual jury selection, after the individual *voir dire* has concluded, as well as the entire trial. In addition, the restriction is limited in duration. The *voir dire* process is being recorded, and thus, a record of the proceedings is being maintained. This record will eventually be transcribed and at that time will be available to the public and press. *Cf. Gannett, supra.*

At oral argument, movants did not suggest any alternative measures for the Court to adopt short of its closure order. The number of potential jurors in this case renders most alternatives impractical, if not

impossible.[5] [[5] Because of the extent of the publicity surrounding this case, this Court sent out notices summoning 1500 potential jurors. Although a significant portion of these people were excused for reasons of hardship, well over half of the people remain as potential jurors.] Sequestration of this extraordinary number of potential jurors is simply not feasible. Furthermore, a limitation on what the press would be allowed to report *might* remedy the intimidation factor, but it would not prevent the exponential multiplication of prejudicial publicity. This Court believes, therefore, that no alternative to closure would adequately protect the defendants' right to a fair trial.

Finally, there is no argument that the closure order will fail to protect against the perceived harms. The elimination of publicity concerning the individual *voir dire* will assure that potential jurors will be insulated from the questions and other jurors' answers for as long as possible. Furthermore, the potential jurors will be more candid in their responses if they do not have to worry about what the public's opinion of those responses might be.

Finally we make explicit what was implicit in our order of January 16, 1984. The stay, entered by us on January 12, 1984, was vacated, once the order of January 16, 1984, appeared.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1039

In re: The Greensboro News Company, The Winston-Salem Journal and Sentinel, The Charlotte News, The Charlotte Observer, and The News and Observer Publishing Company,

Petitioners.

United States of America

v.

Virgil L. Griffin, Edward Woodrow Dawson, David Wayne Matthews, Roland Wayne Wood, Jerry Paul Smith, Jack Wilson Fowler, Jr., Roy C. Toney, Coleman B. Pridmore, and Raeford Miland [sic] Caudel [sic].

Supplemental Opinion in Light of the Motion for Reconsideration, the Petition for Rehearing, and the Suggestion for a Poll on Rehearing *En Banc*.

Submitted: February 10, 1984 Decided: March 7, 1984

Before MURNAGHAN, PHILLIPS, and CHAPMAN, Circuit Judges

Supplemental Opinion

MURNAGHAN, Circuit Judge:

The occasion is not one for surprises, so we state immediately at the outset that we remain unaltered in our views of the law expressed in the opinion released by the Clerk on January 19, 1984. In other words, the decision in the *Press-Enterprise Co.* case,[1] and the developments, following the seating of the jurors and alternates, respecting publication, or rather delay in the making available, of the *voir dire* proceedings, do not shake our composite conviction as to the correctness of what we held in that opinion.

Nevertheless, the extraordinary nature of the way in which the case evolved makes it appropriate to outline the developments incidental to its origins. In that way we hope to dispel misunderstanding as to how and as to why, especially in aspects of timing, things unfolded as they did.

First it should be borne in mind that the case was one both of extraordinary interest and (not necessarily the same thing) of large importance. The district judge, having decided, for reasons appearing sufficient to him, that *voir dire* as to whether potential jurors were susceptible to striking for cause, should be *in camera*, had, by January 12, 1984, proceeded along those lines for 3 days, carrying out over half the task. On January 12, 1984, our stay pending consideration of a mandamus application or hearing of an appeal was entered, bringing to an abrupt pause the conduct of a trial whose progress and completion were of great interest and significance to those

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[1] *Press-Enterprise Co. v. Superior Court of California, Riverside County*, ___ U.S. ___, 52 U.S.L.W. 4113 (January 18, 1984).

directly concerned: a) the accused and b) the public (including 1) relatives and associates of the victims and 2) the news media as eyes and ears of us all).

We moved with dispatch to hear on January 16, 1984, the mandamus application or, alternatively, the appeal, and, if we can be said to have been in haste, it was for that reason and that reason only. We were engaged in no race to publication against the Supreme Court, or, indeed, any other court. It was truly an occasion to give the lie to the animadversions on the law's delay made famous in Hamlet's sixth soliloquy.

On Monday, January 16, 1984, we met in Charlotte, North Carolina, to hear argument. We were relieved to find ourselves ably assisted by well-prepared counsel appearing for all parties (the prosecution, the defense, and the media). Having canvassed the relevant considerations as thoroughly as could be, and finding the situation to be one presenting readily identifiable issues as to which decision, not time-consuming study and tortured reflection, were called for, we, on that same day, January 16, 1984, reached and announced our decision to uphold Judge Flannery's order, dismissing the attack upon it by way of mandamus, and, in the unlikely event that the attempted appeal was not premature, affirming his decision.

Thereafter, by mid-afternoon on January 17, 1984, a proposed opinion had been prepared, discussed and adopted by the three members of the panel. Having clarified with the Chief Judge of the Fourth Circuit Court of Appeals the propriety of doing so, Murnaghan, J., as the author, forthwith dispatched by mail to the Clerk in Richmond, Virginia, the opinion for filing. On that same afternoon of January 17, 1984, he notified a member of the Clerk's staff, and instructed him immediately to inform

all counsel in the case that an opinion had been prepared and mailed to the Clerk and would be available to each of them upon receipt in the Clerk's office. Such notification was made, we are informed, on that same day, January 17, 1984.

Thereupon arose the potentially confusing chain of events. We were, of course, when we heard argument in Charlotte, North Carolina on January 16, 1984, and when we shortly thereafter took decision, aware that the *Press-Enterprise Co.* case had been granted *certiorari* and been argued, and was awaiting decision. We had no inkling, however, that decision would come so soon. In fact, the opinions in it were handed down on January 18, 1984. The fact that the publication date of our opinion was January 19, 1984[2] has led to unmerited suggestions, by counsel who knew better, that we were somewhat remiss in not at least commenting on and attempting to distinguish *Press-Enterprise Co.* Our opinion, however, was completed and launched by mail from the judge's chambers to the Clerk's office for filing before *Press-Enterprise Co.* at the Supreme Court level had seen the light of day. Counsel for the media had been so informed on January 17, 1984.

We did not, and today do not, regard *Press-Enterprise Co.* as particularly close or relevant to the *Greensboro News Co.* case. The *certiorari* note in United States Law Week clearly indicated that *Press-Enterprise Co.* concerned a general rule allowing the closing, for reasons of privacy rights protection, of *voir dire* in any, if not every,

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[2] Apparently the once vaunted next-day service, at least on a dependable basis, is a thing of the past for the United States Postal Service.

case.[3] We, on the other hand, were concerned with a carefully tailored solution for the particular problems of the particular case, and we were permitting no broader an incursion into free press and free speech rights than absolutely necessary to protect competing and overwhelming Sixth Amendment rights arising in that one case.[4] The facts justified the limited, narrowly tailored closure in *Greensboro News Co.* "essential to preserve higher values."[5]

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[3] The notice, under the heading Mass Media, appears at 51 U.S.L.W. 3347 (November 2, 1982):

> Press access to voir dire proceedings in capital cases.
>
> Ruling below (Calif CtApp. 4th Dist, 3/13/82):
>
> Newspaper company's petition for writ of mandate to compel trial court to permit press to be present during voir dire of jury in capital case, and to release transcript of voir dire to public, is denied without opinion.
>
> Questions presented: (1) Does exclusion of public from voir dire proceedings in capital cases constitute direct violation of public's right guaranteed under First Amendment as interpreted by this Court in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 48 LW 5008 (1980)? (2) Has public been denied its right to attend criminal trials as guaranteed by First Amendment and Fourteenth Amendment's Due Process Clause through application of California Supreme Court's decision in Hovey v. Superior Court, 616 P2d 1301 (1980), which held "that in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration"?
>
> Petition for certiorari filed 9/27/82, by Thompson & Colegate and James D. Ward, both of Riverside, Calif.
>
> No. 82-556. Press-Enterprise Co. v. Superior Court.

[4] For that reason, we are skeptical that we are truly presented with a situation "capable of repetition, yet evading review." *See Roe v. Wade*, 410 U.S. 113, 125 (1973). The *Greensboro News Co.* case, as it developed, is nearly unique. In all events, in the view we take of it, on a motion for reconsideration and a petition for rehearing, it is unnecessary to determine whether the issue of mootness should be explored.

[5] *Press-Enterprise Co.*, 52 U.S.L.W. at 4115-16.

Also, Judge Flannery, in the district court, had called for preservation, through transcription, and prompt release, of the *voir dire* proceedings, while the California court in *Press-Enterprise Co.* would have denied access for all time.

Indeed, perhaps the principal significance of *Press-Enterprise Co.* lies in its unambiguous statement that the *voir dire* is part of the trial itself, so that public access may not be denied on the grounds that it is but a preliminary and, as such, somehow less important stage in the proceedings. We, following Judge Flannery's lead, had proceeded on the assumption most favorable to the media, namely, that the *voir dire* took on all the attributes of the trial itself. Furthermore, the *voir dire* in *Press-Enterprise Co.* consumed six weeks, while in *Greensboro News Co.* the process required less than two weeks.

Accordingly, we were unjustly charged with failure to give due deference to prior Supreme Court authority. Though publication of our opinion took place one day later than that of *Press-Enterprise Co.*, it is pellucidly clear that our promulgation through dispatch to the Fourth Circuit Clerk took place prior to publication of the *Press-Enterprise Co.* opinions. As a trivial point, we might mention that, on January 17, 1984, a member of the Fourth Circuit Clerk's staff notified the office of the Clerk of the Supreme Court of the fact that there had come into existence our opinion in the *Greensboro News Co.* case. He indicated that provision of a copy to the Supreme Court would be expedited. He was informed merely that the opinion in *Press-Enterprise Co.* had not yet issued. The office of the Clerk of the Supreme Court supplied no indication that publication was imminent.

Finally, the parties constituting the media base their efforts to secure reconsideration or rehearing on sup-

posed delays and other defects in the making of transcriptions available, now that *voir dire* has been completed and the jurors and alternates seated. Without in any way indicating whether they have valid grounds, we point out that what has occurred, or failed to occur, subsequent to January 16, 1984, the date of our order affirming the action taken by Judge Flannery on January 5, 1984, is not relevant to the correctness of our opinion filed January 19, 1984. To raise the questions the news media parties seek to present, they will have to institute a new proceeding by way of mandamus or appeal, or otherwise.

Accordingly, the petition for rehearing and the motion for reconsideration are denied. The suggestion for a poll on rehearing *en banc* has failed to receive the affirmative vote of the members of the Court in regular active service. The motion for leave to file additional affidavits and documents in support of the petition for rehearing is granted.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1039

In re: The Greensboro News Company, The Winston-Salem Journal and Sentinel, The Charlotte News, The Charlotte Observer, and The News and Observer Publishing Company,

Petitioners.

Date of Entry: January 16, 1984

ORDER

This matter is before the Court on a Petition for mandamus and, alternatively, by notice of appeal seeking vacation of the Order of Honorable Thomas A. Flannery, United States District Judge, providing for the *in camera* conduct of jury *voir dire* in *United States* v. *Griffin*, Criminal No. 83-53-01-G through -09-G, now pending in the United States District Court for the Middle District of North Carolina;

Upon consideration of the Petition with supporting documents, the responses, with supporting documents of the United States and of the defendants in the criminal trial (by joint submission), and the oral arguments of

counsel for the Petitioners, the United States, and the criminal trial defendants;

It is ORDERED and ADJUDGED:

1. That the Petition for writ of mandamus is DENIED; and

2. That, if appeal properly lay from the district court's closure order, the order is AFFIRMED.

An opinion of the Court will be filed as promptly as may be.

With the concurrence of Judge Murnagham [*sic*] and Judge Chapman.

/s/ J. Dickson Phillips, Jr.

J. DICKSON PHILLIPS, JR.
United States Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1039

In re: The Greensboro News Company, The Winston-Salem Journal and Sentinel, The Charlotte News, The Charlotte Observer, and The News and Observer Publishing Company,

Petitioners.

Date of Entry: January 12, 1984 7:07 p.m.

ORDER

Upon consideration of the petition for writ of mandamus to the United States District Court for the Middle District of North Carolina and motion for a stay of the orders of district court entered January 5, 1984 and January 12, 1984, *United States* v. *Griffin*, which provide for the conduct of the *voir dire* of the jury in camera;

With the concurrences of Judge Chapman and Judge Butzner, IT IS ADJUDGED AND ORDERED:

1. The orders of January 5, 1984 and January 12, 1984 which provide for conducting the *voir dire* in camera are stayed pending consideration of the petition for writ of mandamus;

2. The court will hear oral argument on the petition for the writ of mandamus at 10:00 a.m., Monday, January 16, 1984 at the United States Courthouse, Charlotte, North Carolina;

3. The United States is directed to file a response to the petition and any supporting memoranda that it may desire in the office of the clerk of the United States District Court, Charlotte, North Carolina, by 9:00 a.m., Monday, January 16, 1984;

4. The United States is directed to appear by counsel for the oral argument;

5. The court will receive any written submissions that the defendants care to file by 9:00 a.m., Monday, January 16, 1984 in the office of the clerk of the United States District Court, Charlotte, North Carolina, and will entertain oral argument by one counsel for the defendants if they desire to appear.

/s/ J. Dickson Phillips, Jr.

J. DICKSON PHILLIPS, JR.
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA

v.	Criminal No.
VIRGIL L. GRIFFIN	83-53-01-G
EDWARD WOODROW DAWSON	83-53-02-G
DAVID WAYNE MATTHEWS	83-53-03-G
DAVID [*sic*] WAYNE WOOD	83-53-04-G
JERRY PAUL SMITH	83-53-05-G
JACK WILSON FOWLER, JR.	83-53-06-G
ROY C. TONEY	83-53-07-G
COLEMAN B. PRIDMORE, and	83-53-08-G
RAEFORD MILAND [*sic*] CAUDLE	83-53-09-G

Date of Entry: January 12, 1984

MEMORANDUM ORDER

This matter comes before the Court on the motion of The Greensboro News Company, The Winston-Salem Journal and Sentinel, The Charlotte News, The Charlotte Observer, and The News and Observer Publishing Company, ("Movants"), for a hearing in opposition to closure of one facet of jury *voir dire* in this case. Movants sought relief in two areas. Initially, they requested a hearing on

the constitutionality of this Court's January 5, 1984, Order closing the individual *voir dire* to other potential jurors and the public. Secondly, movants sought a ruling that this "Closure Order" is unconstitutional. The first request for relief was granted, and the second is denied for the reasons stated below.

TIMING OF MOVANTS OBJECTION

This Court has been involved in the delicate balancing of the right of the defendants to a trial by a fair and impartial jury, and the right of the people to be informed of the proceedings in this matter from the moment it entered this case. In an attempt to achieve this balance, this Court, in its January 5, 1984 Order, set out the procedure it would follow during jury selection. Specifically, the Order stated that the individual *voir dire* would be conducted *in camera*.[1] *See* Order at 4. This notice was given four days before the selection process was scheduled to begin so that the Court could consider and respond to any objections voiced to these procedures.[2] *Cf. United States v. Criden*, 675 F.2d 550, 559-60 (3d Cir. 1982). No objections were forthcoming. It was not until January 10, 1984, late in the second day of jury selection, that movants filed an appropriate objection. This Court scheduled a hearing on the next day in order to afford movants a

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[1] "*In Camera*" is defined by *Black's Law Dictionary* as "In chambers; in private." It goes on to state that, "cause is said to be heard *in camera* either when the hearing is had before the judge in his private room or when all spectators are excluded from the courtroom."

[2] The January 5, 1984 Order did not go unnoticed by the press. Indeed, that Order was quoted from extensively in the Sunday paper. *See, e.g.*, Winston-Salem Journal, January 8, 1984 at A3.

reasonable opportunity to state their objections to the proceedings.

DISCUSSION

The issue of whether the press has a constitutional right to attend all phases of pretrial and trial proceedings is a complex and largely unresolved question. Three major Supreme Court decisions have addressed this issue, but may have resulted in more open than answered questions. In *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), the Court held that a prior restraint order prohibiting the press from reporting upon the details of a crime, its investigation, or the ensuing trial violated the First Amendment's guaranty of free press. Three years later, the Court found that the public and the press have no right under the Sixth Amendment to insist upon access to pretrial judicial proceedings in a criminal case. *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). The Court explicitly left open the question of whether there is a First Amendment right to attend pretrial proceedings. The Court went on to note, however, that even if such a right exists, it is far from absolute. 443 U.S. at 392-93. The trial court in that case had provided the petitioner with an opportunity to be heard and then balanced the constitutional rights of the press and public against the defendants' right to a fair trial. *Id.* The trial court then found that an open proceeding would pose a reasonable probability of prejudice to the defendants. The Supreme Court held that such a finding was sufficient to justify closing the proceedings. *Id.*

The next year the Court decided *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), which, in contradistinction to *Gannett*, held that the public and press have a First Amend-

ment right to attend criminal trials. Even this right, however, is not absolute. The Court stated that an "overriding interest articulated in findings" could justify closing a criminal trial to the press and public. 448 U.S. at 581.

Neither of the opinions rejecting closure orders control the instant case. Unlike the Court in *Nebraska Press*, this Court has not banned the press from reporting any aspect of the case. Indeed, this very point was emphasized in this Court's Order of January 5, 1984. Order at 10. Similarly, *Richmond Newspapers* is not directly applicable to the case at bar. In *Richmond Newspapers*, the Court dealt with the trial, as opposed to the *voir dire* proceedings. Even if *voir dire* proceedings are considered part of the trial, *see United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982), the facts in the present case meet the criteria for a closure order established by *Richmond Newspapers*.

Before turning to the factors of this case, this Court must pause to consider the standard for a closure order. The Supreme Court has not established a practical standard in this area. As noted above, *Gannett* requires a somewhat nebulous balancing test, and *Richmond Newspapers* required an "overriding interest" to exclude the public. The most stringent test was suggested by Justice Blackmun in dissent in *Gannett*. 443 U.S. at 440-42, 99 S.Ct. at 2936-37. Under that test a court must find the following to justify a closure order:

1. A substantial probability that irreparable damage to defendants' fair-trial right will result from conducting the proceeding in public;
2. A substantial probability that alternatives to closure will not protect adequately his right to fair trial;

3. A substantial probability that closure will be effective in protecting against the perceived harm.

Id. This Court is far from convinced that this stringent test is required to justify a closure order applied to jury selection proceedings.[3] It is aware, however, that the safest course is to apply the strictest test adopted by the Courts that have considered the matter. *See Brooklier, supra*, 685 F.2d at 1167. The test enunciated by Justice Blackmun, therefore, will be applied to the present case.

This Court need not rehash the intense and continuing public interest in this trial. The magnitude of publicity that this case has generated may be unprecedented in this area. A careful and exhaustive *voir dire* process is crucial to ensure that these defendants will be tried by an impartial jury which will render its verdict on the basis of evidence adduced at trial rather than information from the newspapers or television.[4] In order to accomplish this

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[3] *Gannett* would seem to be most closely analogous to the case at bar. It involved pretrial proceedings, and it appears to this Court that jury selection would fall within that category. *Contra Brooklier, supra*, 685 F.2d at 1167. It is this Court's view that a trial begins once jeopardy attaches, *i.e.*, when the jury is sworn. It is unclear, however, to what extent *Gannett* survives *Richmond Newspapers*. This Court is reluctant, therefore, to place its reliance on the holding of *Gannett*.

[4] This Court is not in any way impugning the integrity or fairness of the news media. Quite to the contrary, this Court has been extremely impressed with the even-handed nature of the media coverage of this case and the surrounding events. A television or newspaper report, however, is not, nor should it be, edited in accordance with the Federal Rules of Evidence. Even an impartial news report, therefore, may contain information that would be deemed "prejudicial" in the context of a courtroom. It is crucial that this Court have an opportunity to effectively determine whether the potential jurors are irreparably tainted by the publicity they have been exposed to, or

task the Court felt that it was necessary to question individual jurors outside of the presence of other potential jurors. This procedure has a long history of approval by the Courts. *See e.g., United States v. Bryant*, 471 F.2d 1040 (D.C.Cir. 1972); *United States v. Colabella*, 448 F.2d 1299 (2d Cir. 1971). This rationale for the procedure was vividly described by the District of Columbia Circuit Court, when it stated that:

> It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors that he would be influenced in his verdict by a newspaper story of the trial. Not only so, but had one or more of them said they would be so influenced, and especially if they had explained why, the damage to the defendant would have been spread to the listening other jurors.

Coppedge v. United States, 272 F.2d 504, 508 (1959). That same damage would occur if the press was allowed to observe and report the questions and responses. Potential jurors reading these reports would then be irreparably tainted. Responses would be less trustworthy if jurors felt that the public would look askance at someone too easily influenced by the press. No amount of questioning could remedy this taint. Furthermore, the problem of prejudicial publicity would be multiplied by every response of a potential juror reported in the press. The nature of this case adds an additional problem to the publication of potential jurors' names, county of residence, and responses to questions. This case involves various organizations that occasionally evoke strong opinions in people. It may be that some people believe

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whether they can decide the case solely on the basis of the evidence they hear at trial. Any action that this Court takes to reduce publicity related to that case is taken to further this goal.

that these organizations are prone to violence. If some potential jurors believed these propositions they might be reluctant to express any strong opinions about these organizations, knowing that their responses would be reported by the media. These potential jurors might fear that honest responses would subject them to retribution. Once again, no amount of questioning could remedy responses motivated by fear.

This Court is convinced, therefore, that the first prong of this test is satisfied. The second prong of this test requires the Court to evaluate the effectiveness of alternatives to the closure order that are less restrictive. At this point it should be noted that the Court has attempted to conduct these proceedings as openly as possible, and still protect the impartiality and integrity of the jury. The group *voir dire* as well as the statement of the case is open to the press and public. Furthermore, the press and public will be allowed to observe and report the actual jury selection, after the individual *voir dire* has concluded, as well as the entire trial. In addition, the restriction is limited in duration. The *voir dire* process is being recorded, and thus, a record of the proceedings is being maintained. This record will eventually be transcribed and at that time will be available to the public and press. *Cf. Gannett, supra.*

At oral argument, movants did not suggest any alternative measures for the Court to adopt short of its closure order. The number of potential jurors in this case renders most alternatives impractical, if not impossible.[5]

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[5] Because of the extent of the publicity surrounding this case, this Court sent out notices summoning 1500 potential jurors. Although a significant portion of these people were excused for reasons of hardship, well over half of the people remain as potential jurors.

Sequestration of this extraordinary number of potential jurors is simply not feasible. Furthermore, a limitation on what the press would be allowed to report *might* remedy the intimidation factor, but it would not prevent the exponential multiplication of prejudicial publicity. This Court believes, therefore, that no alternative to closure would adequately protect the defendants' right to a fair trial.

Finally, there is no argument that the closure order will fail to protect against the perceived harms. The elimination of publicity concerning the individual *voir dire* will assure that potential jurors will be insulated from the questions and other jurors' answers for as long as possible. Furthermore, the potential jurors will be more candid in their responses if they do not have to worry about what the public's opinion of those responses might be.

CONCLUSION

This Court is deeply concerned about protecting the press' right to report this trial and the public's right to receive those reports. It is as deeply convinced as the press that the First Amendment rights enunciated by movants are imperative to our entire society and to the public's knowledge and faith in the judicial process. This Court must, however, be equally concerned with the defendants' Sixth Amendment right to be tried by a fair and impartial jury, as well as the other rights protected by our Constitution. This is a difficult balance to strike, and it is imperative that an attempt to protect defendants' Sixth Amendment rights not be perceived as an attempt to cloak this trial in secrecy. This perception could not be further from the truth. In the best of all worlds this Court would like nothing better than to open this process to public scrutiny to allow the public to view the extreme

care that is being exercised, by all parties involved in this case, to attain a fair and impartial jury. To do so, however, would, in the opinion of this Court, thwart the goal of these parties as well as the public, to have this case heard by an impartial jury. This Court has a profound faith in the public and the press, and believes that they will understand that there are other rights involved, and that the defendants' Sixth Amendment rights mandate that a small portion of the pretrial proceedings must be held in private.

This Court finds, therefore, that to protect defendants' Sixth Amendment rights, and solely for that reason, this Motion should be, and hereby is DENIED.

/s/ THOMAS A. FLANNERY

United States District Judge

January 12, 1984

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA

v.	Criminal No.
VIRGIL L. GRIFFIN	83-53-01-G
EDWARD WOODROW DAWSON	83-53-02-G
DAVID WAYNE MATTHEWS	83-53-03-G
ROLAND WAYNE WOOD	83-53-04-G
JERRY PAUL SMITH	83-53-05-G
JACK WILSON FOWLER, JR.	83-53-06-G
ROY C. TONEY	83-53-07-G
COLEMAN B. PRIDMORE, and	83-53-08-G
RAEFORD MILANO CAUDLE	83-53-09-G

Date of Entry: January 5, 1984

MEMORANDUM

During the course of pre-trial proceedings in this case, issues concerning the proper procedures for controlling prejudicial pre-trial publicity have come to the court's attention on several occasions. In additon to numerous other measures outlined herein aimed at ensuring that the defendants in this case are tried based on admissible evidence only and that potential jurors are not prejudiced by pre-trial publicity, the court in May 1983 issued a ban on extrajudicial statements by counsel and witnesses, and modified that Order on October 13, 1983 (October 13 Order). This matter is before the court once again on a motion filed by several potential government witnesses represented by independent counsel requesting that paragraph 3 of the court's October 13 Order be vacated. For the reasons stated herein, this motion is denied, but the

October 13 Order shall be modified as set forth in an accompanying Order.

Background

This court is quite concerned with the potentially prejudicial effects of pre-trial publicity. As the witnesses' counsel has pointed out, along with counsel for the government and defendants on numerous previous occasions, the events in Greensboro on November 3, 1979 which led to the indictments in this case have been the subject of intense local and national publicity. During the 1980 state trial of *North Carolina* v. *Fowler, et al.*, which was also precipitated by the events underlying this trial, the local and national print and electronic media debated the issues presented by the events in Greensboro extensively, and issued many reports and editorials, some of them highly prejudicial. After 1980, publicity about these events died down, but when the indictments in this case were issued and these proceedings began, local and national publicity again intensified.

During the course of the state trial and thereafter, numerous individuals involved in the Greensboro incident who are potential witnesses in this case and alleged members of the Communist Workers Party (CWP), made their strong views on the Greensboro incident known to the public through demonstrations, printed literature, and interviews with the media. These views are directly contrary to the defendants' interests and highly prejudicial. These potential witnesses have forcefully proclaimed that defendants and others are fully responsible for the violence that occurred at Greensboro. That these individuals hold such strong views about defendants' guilt may be understandable from their perspective given their alleged intimate involvement with the November 3,

1979 Greensboro shootings, but the prejudicial impact of the public expression of such views is not diminished by the sincerity of the speakers. As indicated by statements in pleadings filed by witnesses' counsel, the prejudicial views of the witnesses have not changed since the state trial. Although witnesses' counsel argues that widespread public expression of his clients' views would not present an imminent threat to the administration of justice in this case, in speaking for his clients he refers to the events underlying this indictment as the "Greensboro Massacre," and describes these events as a "brutal, public mass shooting," a "savage racially and politically motivated attack," a "heinous crime," a "horrifying spectacle," and "murder." It is precisely because the court feared that such highly prejudicial remarks would be made for public disseminaton by potential witnesses and expected that remarks by potential government witnesses and others that are even more inflammatory would be made publicly, that the court issued its original ban on certain extrajudicial statements.

In addition to proscribing certain extrajudicial statements by counsel, potential witnesses, and others involved in this case, the court has taken and will continue to take additional steps necessary to prevent potential and actual jurors from being exposed to unduly prejudicial publicity. In order to ensure that an impartial, untainted jury is selected, the court will utilize jury selection procedures designed, *inter alia*, to eliminate biased or tainted potential jurors. The veniremen will be drawn from a cross section of voters in the large geographical area surrounding Greensboro that comprises the Middle District of North Carolina. Each potential juror has been mailed a detailed questionnaire, and it is expected that their answers will provide counsel with important background information that will assist in making challenges

for cause and preemptory challenges. In addition to group *voir dire*, the court will conduct extensive individual *voir dire* during which individual potential jurors, *in camera* with defendants present but other potential jurors not present, will be asked probing questions. These questions will be designed, *inter alia*, to determine whether the potential juror has been exposed to and affected by pre-trial publicity. All counsel will be present, and will have an opportunity to challenge each potential juror for cause, outside of the presence of all potential jurors. In addition, both the government and defendants will be given more preemptory strikes than alloted by the Federal Rules. During the entire jury selection process, prospective jurors will not be permitted to discuss the case among themselves or with anyone else.

Throughout the jury selection process and once the trial begins, potential or selected jurors will be under the tight control and supervision of the court to ensure that they are not exposed to anything about the case other than that which is presented in evidence. Federal marshalls will maintain tight control of the jury once it is selected, and extensive efforts will be made to ensure that jurors are not exposed at any time to improper influences or publicity. Although the trial of this case is expected to last for several months, the court will take whatever measures it believes to be necessary to ensure that the jury is insulated during the trial and during jury deliberations from all publicity about the case.

Once the trial begins, the court will, of course, exclude all unfairly prejudicial or non-admissible evidence. In addition, the jury will be instructed before, during, and after the presentation of the evidence that they are forbidden from watching, listening to, or reading *any* public reports about the case. The jury will be prohibited from

discussing the case with anyone. They will also be instructed that if they are nevertheless exposed to any extrajudicial statements, they must inform the court at once.

Witnesses' counsel has suggested that instead of maintaining a ban on extrajudicial statements by witnesses, the court should avoid the problem of prejudicial publicity by authorizing a change of venue. The court notes, however, that neither the government nor defendants have requested a change of venue due to prejudicial publicity. At this stage in the proceedings, the parties apparently believe that justice can be administered as fairly and without extrajudicial influences in the current location as in any other. Further, as witnesses' counsel has conceded, if the court should vacate its "gag order" as requested, then potential government witnesses plan to publicize their view of the case intensively and on a *national* level. Hence, if the court were to adopt witnesses' counsel's suggestion by vacating its "gag order" and changing venue, the new location would still be subject to the national publicity that would be generated by counsel's clients. In such circumstances, an imminent threat to the fair administration of justice due to prejudicial publicity would still exist despite a change of venue.

Instead of adopting the course suggested by witnesses' counsel, the court believes that the interests of justice are better served, and a fair trial is better ensured, if the measures described above regarding jury selection, insulation from improper evidence, and jury control are combined with an appropriate ban on extrajudicial statements.

Intent and Scope of the Court's Ban on Extrajudicial Statements

Although the court expects that the impact of prejudicial publicity will be reduced by the measures described above to ensure an insulated and impartial jury, it finds nevertheless that continuation of its prohibition of certain extrajudicial statements by counsel, witnesses, and others involved in this case is necessary to prevent a serious and imminent threat to the administration of justice that would arise if the court's "gag order" were vacated. The court bases this finding on the representation by witnesses' counsel that his clients intend to make their views on this and related cases widely known if the "gag order" is lifted, and on the court's conclusion that the views of counsel's clients are directly contrary to defendants' interests and are inflammatory and prejudicial. As noted above, witnesses' counsel, whose view of the case is representative of his clients' view, has described the defendants' actions on November 3, 1979 in highly prejudicial terms. During its monitoring of discovery in this case, the court has extensively reviewed documents written or published by several potential witnesses, has read numerous published interviews of such witnesses, and has read documents and press reports of such witnesses' activities during and subsequent to the state trial. Many of these documents, interviews, and accounts contain statements by potential witnesses which, regardless of their truth or falsehood, are highly prejudicial. If the court were to remove its "gag order," such witnesses would undoubtedly continue to express these strong and prejudicial views in public, within electronic or printed "earshot" of potential jurors, and to the detriment of defendants' rights to be tried by an unbiased jury based solely on admissible evidence.

Witnesses' counsel is correct that absent such a finding in the record, the court's authority to proscribe extrajudicial statements is constitutionally suspect. Having made the requisite finding, however, the court's authority to issue a "gag order" is clear. *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966); *see also Hirschkop* v. *Snead*, 594 F.2d 356, 369-70 (4th Cir. 1979). The first amendment rights of potential witnesses in a criminal case are not absolute; in appropriate circumstances such as those present here they are outweighed by the right of criminal defendants to a fair trial based solely on admissible evidence, *see Sheppard*, 384 U.S. at 350-51, 86 S.Ct. at 1516; *Irvin* v. *Dowd*, 366 U.S. 717, 730, 81 S.Ct. 1639, 1647 (1961) (Frankfurter, J., concurring).

Witnesses' counsel has expressed confusion regarding the scope and intent of the court's "gag order" as modified by its October 13 Order. In order to dispel such confusion among counsel and potential witnesses, the court will modify its October 13 Order in several respects. As modified, the court's Order makes it clear that:

1. Counsel for potential witnesses are restricted in their public statements to the same extent and under the same guidelines as are counsel associated with the prosecution and the defendants. The restrictions imposed are consistent with *Hirschkop*, *supra*.

2. The potential witnesses covered by the Order are those who have been notified by the government or defendants that they may be called to testify in this case, and those who are actually called to testify.

3. The Order prohibits such potential witnesses from making or authorizing any extrajudicial statement relating to the testimony in this case that such potential witnesses may give, or relating to any of the parties or issues such potential witnesses expect

or should reasonably expect to be involved in this case, or relating to the events leading up to and culminating in the shooting incident at Everitt and Carver Streets in Greensboro, North Carolina, on November 3, 1979, if such statements are intended for dissemination by means of public communication.

4. Potential witnesses shall *not* conduct any interviews with the print or electronic media in which the issues described in paragraph 3 are discussed.

5. Potential witnesses shall *not* make any proscribed statements, either orally or in written or demonstrative form, which are intended by such potential witnesses to be disseminated by means of public communication. This includes statements by potential witnesses to any third party whom such potential witnesses authorize, intend, or expect to disseminate such statements by means of public communication.

6. Nothing in this Order shall be deemed to prevent or interfere with the right of potential witnesses to discuss this case or any related case fully with counsel.

7. Nothing in this Order shall be deemed to prevent or interfere with the right of any potential witness to testify in court or by way of court authorized depositions or interrogatories in connection with any other case about all events, issues, and persons relevant to such case.

8. Nothing in this Order shall be deemed to prevent potential witnesses from *privately* soliciting funds to aid in the prosecution or defense of any related case, and such potential witnesses may discuss the events leading up to and following the Greensboro shootings in *private*, provided such discussions are not intended by such witnesses to result in dissemination of proscribed statements by means of public communication. Potential witnesses are permitted, in aid of their efforts to solicit funds, to

send private letters to potential contributors, provided such potential contributors are in no way involved with this case.

Finally, it should be clear that, unlike in the *Nebraska Press* case heavily relied upon by witnesses' counsel, *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 96 S.Ct. 2791 (1976), this court has at no time banned the press from reporting this case. Although, as authorized by *Sheppard*, *supra*, the press will be tightly controlled in its access to jurors and witnesses during trial, and will be confined to certain areas of the courtroom once the trial begins, the press is free to report this case based on its observation of court proceedings. The court hopes, and hereby requests, that the press will cover this case in a responsible and ethical fashion and will avoid publicizing information that is prejudicial and has not been deemed admissible evidence during the trial.

An appropriate Order accompanies this Memorandum, and counsel for the government, defendants, and potential witnesses have been directed to make copies of this Order available to potential witnesses.

/s/ THOMAS A. FLANNERY

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA

v.	Criminal No.
VIRGIL L. GRIFFIN	83-53-01-G
EDWARD WOODROW DAWSON	83-53-02-G
DAVID WAYNE MATTHEWS	83-53-03-G
ROLAND WAYNE WOOD	83-53-04-G
JERRY PAUL SMITH	83-53-05-G
JACK WILSON FOWLER, JR.	83-53-06-G
ROY C. TONEY	83-53-07-G
COLEMAN B. PRIDMORE, and	83-53-08-G
RAEFORD MILANO CAUDLE	83-53-09-G

Date of Entry: January 5, 1984

ORDER

This matter came before the court on a motion filed by several potential witnesses in this case to vacate paragraph 3 of the court's October 13, 1983 Order Modifying Previous Order Re: Extrajudicial Statements by Counsel and Witnesses (October 13 Order). Based on the explicit findings of fact contained in an accompanying Memorandum combined, with the finding of fact contained in the October 13 Order, and for the reasons set forth in the accompanying Memorandum, the court has determined, after careful consideration of the potential witnesses' motion, memorandum in support thereof, the arguments of counsel, and the entire record in this case, that the potential witnesses' motion shall be denied. The court has also determined that its October 13, 1983 Order shall be modified in several respects. Therefore, for the reasons ex-

plained fully in the accompanying Memorandum, it is, by the court, this 4th day of January 1983 [*sic*],

ORDERED that the potential witnesses' motion to vacate paragraph 3 of the court's October 13 Order is denied; and it is further

ORDERED, for purposes of clarification, that paragraph 1 of the court's May 13, 1983 Order, relating to extrajudicial statements by certain government personnel, shall remain in full force and effect; and it is further

ORDERED that paragraph 2 of the court's October 13 Order shall be modified to read as follows:

> 2. The lawyers associated with the prosecution or defense of this case, as well as counsel for potential witnesses in this case, are directed to carefully review the provisions of Local Rule 2(g) of the Rules of the United States Court for the Middle District of North Carolina and to follow its provisions meticulously.

And it is further

ORDERED that paragraph 3 of the court's October 13 Order shall be modified to read as follows:

> 3. Any person who is a potential witness in this case, as defined in subparagraph (a) below, SHALL NOT make any extrajudicial statement that relates to, concerns, or discusses the testimony such potential witness may give in this case, *or* any of the parties or issues such potential witness expects or reasonably should expect to be involved in this case, *or* the events leading up to and culminating in the shooting incident at Everitt and Carver Streets in Greensboro, North Carolina, on November 3, 1979, *if* such statement is intended for dissemination by means of public communication.
>
> (a) A "potential witness" is a person who has been notified by the government or by defendants that he

or she may be called to testify in this case, or any person who has actually testified in this case.

(b) Potential witnesses SHALL NOT conduct any interviews with the print or electronic media during which such potential witness makes any statement, orally or in writing, that is proscribed by this paragraph of this Order.

(c) An extrajudicial statement proscribed by this paragraph of this Order SHALL NOT be made by any potential witness if such potential witness *intends* such statement to be disseminated by means of public communication. This includes any proscribed statement by a potential witness to any third party whom such potential witness authorizes, intends, or expects to disseminate such statement by means of public communication.

(d) Nothing in this Order shall be deemed to prevent or interfere with the right of potential witnesses to discuss this case or any other case fully with counsel.

(e) Nothing in this Order shall be deemed to prevent or interfere with the right of any potential witness to testify in court or by way of court authorized depositions or interrogatories in connection with any other case about all events, issues and persons relevant to such case.

(f) Nothing in this Order shall be deemed to prevent potential witnesses from *privately* soliciting funds to aid in the prosecution or defense of any related case. During the course of such private solicitation, potential witnesses are free to discuss the events leading up to and following the Greensboro shootings, provided such discussions are not intended by potential witnesses to result in dissemination of proscribed statements by means of public communication. Potential witnesses are permitted, pursuant to such efforts to solicit funds, to send private letters to potential contributors, pro-

vided such potential contributors are in no way involved in this case.

And it is further

ORDERED that counsel for defendants, the government, and potential witnesses shall make copies of this Order available to all potential witnesses they expect to call at trial or represent.

/s/ THOMAS A. FLANNERY

UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA

v.	Criminal No.
VIRGIL L. GRIFFIN	83-53-01-G
EDWARD WOODROW DAWSON	83-53-02-G
DAVID WAYNE MATTHEWS	83-53-03-G
ROLAND WAYNE WOOD	83-53-04-G
JERRY PAUL SMITH	83-53-05-G
JACK WILSON FOWLER, JR.	83-53-06-G
ROY C. TONEY	83-53-07-G
COLEMAN B. PRIDMORE, and	83-53-08-G
RAEFORD MILANO CAUDLE	83-53-09-G

Date of Entry: January 24, 1984

ORDER

This matter comes before the Court on the Motion of the Greensboro News Company, the Winston-Salem Journal and Sentinel, the Charlotte News, the Charlotte Observer and the News and Observer Publishing Company, Inc., ("Movant"), for this Court to order that a transcription of the closed jury *voir dire* proceedings in this case be made available to movants at no expense to individual members of the public and press as soon as reasonably practicable.

This Court has always intended to have a transcript of the proceedings made available as soon as is reasonably practicable. This portion of the motion, therefore, is hereby GRANTED. Movants cannot direct this Court to

any authority, however, that would entitle them to receive this transcript at no cost. This part of the motion is hereby DENIED. Movants are free to contact the court reporter to arrange for attaining the transcript of the *in camera voir dire* proceedings.

/s/ THOMAS A. FLANNERY

UNITED STATES DISTRICT JUDGE

January 24, 1984.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

UNITED STATES OF AMERICA

v.	Criminal No.
VIRGIL L. GRIFFIN	83-53-01-G
EDWARD WOODROW DAWSON	83-53-02-G
DAVID WAYNE MATTHEWS	83-53-03-G
ROLAND WAYNE WOOD	83-53-04-G
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JACK WILSON FOWLER, JR.	83-53-06-G
ROY C. TONEY	83-53-07-G
COLEMAN B. PRIDMORE, and	83-53-08-G
RAEFORD MILANO CAUDLE	83-53-09-G

Date of Entry: January 31, 1984

ORDER

It has come to the Court's attention that no purchase orders have yet been placed for transcripts of the *in camera* jury *voir dire* conducted in this case. Shortly after the jury was selected, the Court ordered that a transcription of the closed proceedings be made available for purchase as soon as reasonably practicable. Several newspapers filed a motion requesting that transcripts be made available to them free of charge. The Court denied this unusual request.

Upon further reflection and in light of the newspapers' request for free access to the *voir dire* transcripts, the Court has decided to place one copy of the *voir dire* transcripts, as portions become available, in the public docket for inspection by interested parties.

Normally, transcripts are not placed in the docket until an appeal, if any, is taken from a completed trial. Transcripts are normally available on an expedited basis only if they are ordered by a paying customer and prepared at his or her request. The Court recently learned that the cost of ordering *voir dire* transcripts for this case would be approximately $3,400. Because of this high cost, because *voir dire* was closed in this case, and because of the intense interest of the public and the press in these proceedings, the Court has decided to depart from normal procedures and order that, regardless of whether transcripts have been ordered for purchase, a copy should be placed in the public record as soon as portions become available from the court reporter.

The court reporter has already been requested to work on preparing these transcripts. Transcripts of the examination of seven sample jurors were prepared to aid the Fourth Circuit in its review of this Court's Closure Order, and those transcripts will be placed in the public docket immediately. The Court notes that the reporter, who is obligated to be at this trial during normal working hours, has hired an assistant to help with transcription during these hours and has herself graciously consented to work overtime to complete these lengthy transcripts as expeditiously as possible. As soon as portions become available and are properly proofread, they will be placed in the public docket.

In accordance with the foregoing, IT IS, by the Court, this 31st day of January, 1984 hereby

ORDERED that a transcription of the *in camera* jury *voir dire* in this case shall be placed in the public docket for inspection by the public and the press, as soon as portions become available; and it is further ORDERED

that the transcripts of seven sample jurors prepared during proceedings before the Fourth Circuit be taken out from under seal and placed in the public docket immediately.

/s/ THOMAS A. FLANNERY

UNITED STATES DISTRICT JUDGE

Office-Supreme Court, U.S.
FILED
AUG 7 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1995

In the Supreme Court of the United States

OCTOBER TERM, 1984

GREENSBORO NEWS COMPANY, ET AL., PETITIONERS

v.

THOMAS A. FLANNERY, JUDGE ASSIGNED TO UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in declining to issue a writ of mandamus requiring the district court to vacate an order excluding the press and public from part of the jury selection procedures in a criminal case that had attracted extensive publicity.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

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GREENSBORO NEWS COMPANY, ET AL., PETITIONERS

v.

THOMAS A. FLANNERY, JUDGE ASSIGNED TO UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 727 F.2d 1320. The supplemental opinion of the court of appeals (Pet. App. A16-A22) is reported at 727 F.2d 1326. The district court's opinions of January 5, 1984 (Pet. App. A36-A44) and January 12, 1984 (Pet. App. A27-A35) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1984. A petition for rehearing was denied on March 7, 1984 (Pet. App. A16-A22). The petition for a writ of certiorari was filed on June 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, several news organizations, challenge a pretrial order providing that a portion of the voir dire be conducted in camera in *United States* v. *Griffin*, Crim. No. 83-53-01-G, a criminal trial held in the United States District Court for the Middle District of North Carolina in early 1984.

1. In April 1983, a federal grand jury indicted nine persons (alleged members of the Ku Klux Klan or the American Nazi Party) for conspiring to violate, and violating, the rights of participants in an anti-Klan parade by attacking them because of their race and political beliefs, in violation of 18 U.S.C. 245 and 371, and conspiring to obstruct the subsequent criminal investigation into the incident, in violation of 18 U.S.C. 371. The indictment charged that as a result of defendants' attack, five persons were killed and seven others injured (Pet. App. A3). The federal indictment was returned after many of the same defendants had been acquitted in a state court trial.

The present controversy has its roots in pretrial orders entered in May and October 1983 (Pet. App. A36). Those orders prohibited counsel and witnesses in the federal proceedings from making extrajudicial public statements about the case (*ibid.*).

In November 1983, 17 potential government witnesses moved to relax the ban on public statements. Following a hearing in December 1983, the district court denied the motion on January 5, 1984 (Pet. App. A36-A44). It noted that the matter had received extensive local and national publicity from the time of the shooting in 1979 through the completion of the state court trial in 1980, and that public interest had been aroused again as a result of the federal indictments (*id.* at A37). The court found (*id.* at A37-A38) that past statements by the witnesses, as well as in-court

statements by their counsel,[1] demonstrated that any public comments by the witnesses would be prejudicial to the defendants. Since the witnesses had expressed an intent to generate national publicity about the case, the court rejected the alternative of a change of venue (*id.* at A40). In a further effort to reduce the effect of pretrial publicity, the court indicated (*id.* at A38-A39) that it planned further steps, including additional peremptory challenges and individual in camera voir dire of potential jurors.[2]

Voir dire began four days later, on Monday, January 9, 1984. Following a group voir dire to determine which of the initial group of prospective jurors should be excused for hardship or because of an acquaintance with the parties, Judge Flannery excused all members of the panel from the courtroom, recalled one of them, and announced that individual voir dire would be closed to the public and press (Pet. 4). Neither the prosecution nor the defendants objected to this procedure (Pet. App. A5).

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[1]Counsel for the potential witnesses had characterized the shooting incident as the "Greensboro Massacre," a "brutal, public mass shooting," a "savage racially and politically motivated attack," a "heinous crime," a "horrifying spectacle," and "murder" (Pet. App. A38).

[2]The potential government witnesses petitioned the court of appeals for a writ of mandamus requiring the district court to vacate the order of January 5. The court of appeals declined to issue the writ because it concluded that the district court's order did not violate the witnesses' First Amendment rights. *In re Russell*, 726 F.2d 1007 (4th Cir. 1984). The court stated that the extensive pretrial publicity, the past statements of the witnesses, and their counsel's expression of their desire to make statements adverse to the interests of the defendants supported the conclusion that "there was a reasonable likelihood that the defendants would be denied a fair trial without proscribing certain of petitioners' extrajudicial statements" (726 F.2d at 1010). On April 9, 1984, the witnesses filed a petition for a writ of certiorari in this Court seeking review of the court of appeals' judgment. *Lacie Russell* v. *Thomas A. Flannery, United States District Judge*, No. 83-6543. The United States filed a brief in opposition to the petition on May 30, 1984.

On the afternoon of January 9, 1984, petitioners filed a motion for a hearing concerning the propriety of closing the individual voir dire proceedings (Pet. App. A4). A hearing was held on this motion on January 11, 1984, and the court issued an order denying relief the next day (*ibid.*).[3] In so doing, the court applied what it found to be "[t]he most stringent test" articulated by any court (Pet. App. A30), citing *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 440-442 (1979) (Blackmun, J.). Under that test, an order closing proceedings in a criminal trial is justified only if a substantial probability exists that (1) conducting a public proceeding will irreparably damage a defendant's right to a fair trial; (2) alternatives to closure will not adequately protect the defendant's right to a fair trial; and (3) closure will effectively protect against the perceived harm (*ibid.*).

The district court observed (Pet. App. A31) that "[t]he magnitude of publicity that this case has generated may be unprecedented in this area. A careful and exhaustive *voir dire* process is crucial to ensure that these defendants will be tried by an impartial jury which will render its verdict on the basis of evidence adduced at trial rather than information from the newspapers or television." The court expressed its belief that, in order to accomplish this task, it was necessary to question individual jurors in camera, outside the presence of other potential jurors and of the press (*id.* at A32). The court noted that potential jurors reading press reports of the questions and responses at voir dire "would * * * be

---

[3]By January 12, 1984, the district court had identified 48 prospective jurors who were not disqualified for cause and had excused 37 others for cause. The court had previously decided to identify 70 jurors who would not be excused for cause. Because of the extraordinary nature of the case, a panel of 1,500 prospective jurors had been called. Even after many of these had been released because of hardship, more than 750 persons were available for voir dire questioning (Pet. App. A5 & n.4).

irreparably tainted" (*ibid.*). The court further noted (*id.* at A32-A33):

> The nature of this case adds an additional problem to the publication of potential jurors' names, county of residence, and responses to questions. This case involves various organizations that occasionally evoke strong opinions in people. It may be that some people believe that these organizations are prone to violence. If some potential jurors believed these propositions they might be reluctant to express any strong opinions about these organizations, knowing that their responses would be reported by the media. These potential jurors might fear that honest responses would subject them to retribution. Once again, no amount of questioning could remedy responses motivated by fear.

The district court pointed out that the restriction was limited both in scope and duration, because every aspect of the trial other than the individual voir dire would be open, and because the individual voir dire process itself would be recorded and a transcript made available to the public and press (Pet. App. A33). In addition, the court noted that petitioners "did not suggest any alternative measures for the Court to adopt short of its closure order," and that sequestration of the large number of persons necessary to obtain a panel of 70 jurors would be impossible (*ibid.*).

Finally, the district court concluded that the procedure chosen would "protect against the perceived harms" (Pet. App. A34). The court explained (*ibid.*):

> The elimination of publicity concerning the individual *voir dire* will assure that potential jurors will be insulated from the questions and other jurors' answers for as long as possible. Furthermore, the potential jurors will be more candid in their responses if they do not

have to worry about what the public's opinion of those responses might be.

2. Petitioners filed a petition for a writ of mandamus in the United States Court of Appeals for the Fourth Circuit seeking an order vacating the district court's closure order. On the evening of January 12, 1984, the court of appeals entered a temporary stay that halted the voir dire (Pet. App. A5, A25). On January 16, 1984, the court dissolved the stay and denied the mandamus petition (Pet. App. A23).[4] Individual voir dire proceedings resumed in the district court the next day and concluded on January 19 (Pet. 5); on January 20 peremptory challenges were exercised in open proceedings and the jury was empanelled.

The court of appeals' opinion was filed on January 19, 1984. It expressly adopted the trial judge's analysis (Pet. App. A11-A15), and concluded that, "with an unavoidable minimum of interference with freedom of access to information, the district judge has avoided a very real risk of substantial diminution in the rights of the defendants to a trial by an impartial jury guaranteed by the Sixth Amendment" (*id.* at A6). The court commended the trial judge "for a sensitive and sensible solution to an almost intractable problem" (*id.* at A10). The court of appeals emphasized that petitioners had "insisted on but one solution, putting forth no alternative for consideration" (*id.* at A7 (footnote omitted)), and that, although the district court's order delayed press access to the individual voir dire proceedings, it did not prohibit such access altogether (*id.* at A9 & n.7, A10).

On March 7, 1984, the court of appeals denied a petition for rehearing and issued a supplemental opinion (Pet. App

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[4]On January 17, 1984, petitioners applied to this Court for a stay of the district court order. That application was withdrawn on January 23, 1984, following the completion of all closed proceedings in the criminal trial.

A16-A22) that distinguished this Court's recent decision in *Press-Enterprise Co.* v. *Superior Court*, No. 82-556 (Jan. 18, 1984).[5]

On April 15, 1984, the jury acquitted all defendants in *United States* v. *Griffin* on all charges (Pet. 6).

ARGUMENT

The court of appeals' judgment, declining to require the district court to vacate its order closing a portion of the voir dire proceedings to the press and public, was correct. The court of appeals' decision presents no novel questions. Rather, it involves only the application of settled legal principles to the unique facts of this case. The ruling does not conflict with decisions of this Court or other courts of appeals and does not warrant further review by this Court.[6]

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[5]In its supplemental opinion, the court of appeals explained (Pet. App. A18-A19) that its initial opinion had been completed and mailed to the clerk's office on January 17 and that all counsel were notified on that date. For that reason, the initial opinion had not discussed *Press-Enterprise*.

[6]In denying rehearing, the court of appeals deemed it "unnecessary to determine whether the issue of mootness should be explored," but stated it was "skeptical that we are truly presented with a situation 'capable of repetition, yet evading review.' *See Roe* v. *Wade*, 410 U.S. 113, 125 (1973)" (Pet. App. A20 n.4). The court noted that the "*Greensboro News Co.* case, as it developed, is nearly unique" (*ibid.*). Petitioners contend (Pet. 7 n.3) that "[b]ecause the Fourth Circuit upheld the district court's closure order, it is reasonably foreseeable that other *voir dire* proceedings will be closed by other judges" should similar circumstances be present. See *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 602-603 (1982); *Richmond Newspaper, Inc.* v. *Virginia*, 448 U.S. 555, 563 (1980) (Burger, C.J.); *Gannett Co.* v. *DePasquale*, 443 U.S. at 377-378; *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-547 (1976). While there may be some basis for this contention, the probability of repetition is speculative at best. These circumstances substantially diminish the significance of the case and, taken with the reasons developed below, suggest certiorari should be denied.

1. This Court has held that the press and public have a qualified First Amendment right to attend criminal trials, *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), and voir dire proceedings, *Press-Enterprise Co.* v. *Superior Court*, No. 82-556 (Jan. 18, 1984). That right is, however, not absolute. In appropriate cases, "the right to an open trial may give way * * * to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller* v. *Georgia*, No. 83-321 (May 21, 1984), slip op. 5-6.

In *Press-Enterprise Co.* v. *Superior Court*, *supra*, the Court said (slip op. 3, 8) that "the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown," and specifically that

> [t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

In addition, the trial court must consider reasonable alternatives to closing the proceeding (*id.* at 9). See also *Waller* v. *Georgia*, slip op. 8. As we show below, the closure ordered in this case fully comports with the standards enunciated in *Press-Enterprise* and *Waller*.

a. *Overriding interest.* In *Press-Enterprise*, this Court expressly acknowledged (slip op. 8) that "the right of an accused to fundamental fairness in the jury selection process is a compelling interest" that may, in appropriate circumstances, take precedence over the right of the public and press to open trial proceedings. The district court's findings

in this case — in which the court of appeals concurred — demonstrate that the circumstances fit comfortably within the standards set forth in *Press-Enterprise*.[7]

In the present case, the district court found that, because of extensive pretrial publicity, a substantial probability existed that open voir dire proceedings would irreparably damage defendants' right to a fair trial. Moreover, the court found that potential jurors would be tainted if they read press reports about the questioning of other veniremen (Pet. App. A32). It also found that potential jurors would be less likely to admit bias in the presence of the public and press, and that closed proceedings would alleviate the fear of potential jurors that truthful answers might subject them to retribution (*id.* at A32-A33).

Petitioners assert (Pet. 16) that the district court's findings concerning the effect of pretrial publicity upon jurors are insufficient because they are based entirely upon "speculation." But this Court itself observed in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 563 (1976), that a district court's "conclusion as to the impact of such publicity on prospective jurors [is] of necessity speculative," involving "factors unknown and unknowable." The trial judge's first-hand knowledge of the situation places him in the best position to gauge the effect of the pretrial publicity upon the defendants' right to a fair trial, and there is nothing in the record to suggest that his findings in this regard are incorrect.[8]

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[7]In cases where, as here, the court of appeals has adopted the district court's findings of fact (Pet. App. A6, A12-A13), this Court has traditionally been reluctant to disturb such findings. *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948).

[8]Analogous findings were made in *United States* v. *Hearst*, 412 F. Supp. 873, 876 (N.D. Cal. 1976). In closing the individual voir dire proceeding to the press and public, the district court explained that:

b. *Narrowly tailored relief.* The district court's closure order in this case was no broader than necessary to protect the defendants' right to a fair trial. The order closed only a small part of the proceedings, the individual voir dire. The remainder of the jury selection process, as well as the entire trial, were open to the press and public.[9] In addition, the order required that the transcripts of the closed proceedings be made publicly available. Unlike a total ban on access, the order under review affords the press the opportunity to inform the public of the details of the closed proceedings. Cf. *Gannett Co.* v. *DePasquale*, 443 U.S. at 393. Thus, the court "narrowly tailored" its order to preserve the defendants' right to a trial by an impartial jury. *Press-Enterprise*, slip op. 8.[10]

c. *Alternatives to closure.* The district court fully discharged its obligation to consider alternatives to closure. It rejected a change of venue or sequestration of the panel, and

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> the Court's purpose in isolating each juror from his or her fellow jurors in the individual questioning process would be ill-served were the remaining jurors to be exposed to news accounts of the proceedings from which they had been barred. Not only would the risk be increased that prospective jurors harboring no preconceived notions as to guilt or innocence of the defendant be implanted with the seed of prejudice by the statements of those questioned before them, but the difficult task of speaking one's mind concerning the highly sensitive and potentially embarrassing topic of personal bias would be made all the more difficult by the presence of a large audience of news reporters busily taking down every spoken word.

[9]In contrast, the closure order in *Press-Enterprise* barred the public from all but three days of voir dire proceedings that consumed six weeks (slip op. 1).

[10]Petitioners state (Pet. 7) that the closed proceedings had not been fully transcribed at the time they filed their petition for a writ of certiorari. As the court of appeals correctly recognized in its supplemental opinion (Pet. App. A21-A22), however, this unanticipated delay in the completion of transcripts does not affect the validity of the district court's closure order.

refused to impose a prior restraint on what the press would be allowed to report (Pet. App. A34, A40).

Petitioners do not contend that the district court erred in rejecting these alternatives. Rather, they assert that the court erred in failing to adopt three other options (Pet. 18-19) that were never presented for its consideration (Pet. App. A33). Having failed to offer these proposals to the lower courts, however, petitioners have no cause to complain to this Court. In any event, as the court of appeals noted (*ibid.*), in the circumstances of this case most measures short of the limited closure order entered by the district court would have been "impractical, if not impossible."

d. *Specificity of findings.* Petitioners contend (Pet. 22) that the district court failed to make specific factual findings capable of meaningful appellate review. This claim is without merit. The district court clearly understood its obligation to articulate findings to support closure (Pet. App. A30), and set forth those findings in sufficient detail (*id.* at A30-A34). The court of appeals expressed no concern over the specificity or precision of the district court's findings (see Pet. App. A11).

This Court's decisions require only that the trial judge articulate "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise*, slip op. 8. That standard was clearly satisfied.

2. Contrary to petitioners' contention (Pet. 7), the court of appeals' decision does not conflict with this Court's decisions. In *Press-Enterprise Co.* v. *Superior Court*, *supra*, the trial judge had made no findings to support his conclusion that the defendant's Sixth Amendment right to a fair trial and the privacy interests of jurors were threatened by an open proceeding (slip op. 9). The trial judge also had

failed to consider any alternatives to closure (*ibid.*) and refused to release the transcript of the closed proceeding even after the defendant had been convicted and sentenced (*id.* at 2). In addition, the closed voir dire proceedings in that case lasted six weeks, a period which the Court characterized as "incredible" (*id.* at 11). Here, in contrast, the district court carefully considered alternatives and made specific findings that fully justify its order; moreover, the closed proceedings comprised only portions of seven trial days, and the transcript was not barred to the press.

Globe Newspaper Co. v. *Superior Court, supra,* is also distinguishable. That case involved a state statute that required trial judges to exclude the press and public from the courtroom during the testimony of an underage victim of a sexual offense. The Court held that the statute violated the First Amendment right of the press and public of access to criminal trials on the ground that "a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional" (457 U.S. at 611 n.27). The instant case, of course, involves no mandatory closure rule and the trial court's findings satisfied the standard for particularity.

Richmond Newspapers, Inc. v. *Virginia, supra,* also presents completely different circumstances. In that case the trial judge closed an entire murder trial. In holding that the closure violated the First Amendment right of the press and public to attend criminal trials, this Court observed that "the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; [and] there was no

recognition of any right under the Constitution for the public or press to attend the trial" (448 U.S. at 580-581).[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1984

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[11]There is no merit to petitioners' claim (Pet. 7 n.4, 21 n.15) that the decision below conflicts with those of other courts of appeals. The cases upon which petitioners rely, *United States ex rel. The Pulitzer Publishing Co.*, 635 F.2d 676 (8th Cir. 1980), *United States* v. *Criden*, 675 F.2d 550 (3d Cir. 1982), and *United States* v. *Brooklier*, 685 F.2d 1162 (9th Cir. 1982), create no standards for articulating reasons for closure that were not satisfied here. The decision below is, at all events, in full accord with the decisions of other courts of appeals upholding closure orders entered to protect a defendant's right to a fair trial. See, *e.g.*, *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984); *United States* v. *Chagra*, 701 F.2d 354 (5th Cir. 1983); *Sacramento Bee* v. *United States District Court*, 656 F.2d 477 (9th Cir. 1981), cert. denied, 456 U.S. 983 (1982).

DOJ-1984-08